Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

PAPER, ALLIED-INDUSTRIAL, CHEMICAL & ENERGY WORKERS INTERNATIONAL UNION,

Petitioner,

v.

TNS, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court of appeals has the authority to vacate a National Labor Relations Board decision that an employer has violated the National Labor Relations Act and must reinstate employees with backpay solely on the ground that the Board engaged in inexcusable delay in reaching its decision.

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Petitioner PACE International Union (the Intervenor below) prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit, entered on July 10, 2002.

OPINIONS BELOW

The opinion for the United States Court of Appeals for the Sixth Circuit is reported at 296 F.3d 384 and is reprinted in the Appendix to this Petition at 1a-34a. The opinion of the National Labor Relations Board is reported at 329 N.L.R.B. 602 and is reprinted at Pet. App. 35a-83a.

JURISDICTION

The decision of the Court of Appeals was issued on July 10, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 502 of the NLRA, 29 U.S.C. § 143 (2002), is reprinted in full at Pet. App. 84a. It provides, in pertinent part:

> Nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act.

STATEMENT OF THE CASE

A. Factual Background

When Petitioner PACE International Union (formerly OCAW) organized the TNS employees in 1977, TNS (formerly Tennessee Nuclear Specialties) was a small foundry in the Appalachian mountains of Tennessee that employed fewer than 30 unskilled production and maintenance workers, mostly young, male, and poorly educated. Recommended Decision and Order of the Administrative Law Judge (ALJD) at 7, 90, 24.[1] The facility manufactured depleted uranium metal (DU) from greensalt, a by-product of the uranium enrichment process. *Id.* at 7. DU, which is over ten times heavier than steel and ignites spontaneously in air, is ideal for armor-piercing warheads.[2] Within a year after the Union negotiated the first collective bargaining agreement, TNS was purchased by Aerojet, a subsidiary of General Tire and Rubber, which had a contract with the Department of Defense to manufacture anti-tank ordnance. *Id.* at 5, 7. Within another year, TNS had more than tripled the size of its workforce and had added a "penetrator shop," including a metal casting process and a machine shop for manufacturing

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[1] Ten copies of the 160 page ALJD have been lodged with the Clerk's Office.

[2] DU ordnance was used on the battlefield for the first time in the Gulf War in 1991 and later by U.S. troops in Kosovo.

GAU-8 missile cores. *Id.* at 5, 7-8, 91. TNS continually increased its production quotas to meet its contract deadlines. *Id.* at 7, 50.

DU is considered mildly radioactive in comparison to enriched uranium because it emits primarily alpha particles, a form of radiation that, unlike beta and gamma rays, is not capable of penetrating human skin. *Id.* at 32. For that reason, DU does not pose a significant danger in a facility with adequate containment processes. As long as a worker does not breathe or swallow DU or ingest it through cuts or open sores, there is little reason for concern. However, once DU enters the body, alpha particles are by far the most dangerous form of radiation, causing lung cancer, colon cancer, and genetic damage. *Id.* at 36. DU also causes damage to the kidneys because it is a heavy metal, like lead and arsenic. *Id.* Here, by May 1981, when the TNS workforce went out on strike over what they perceived to be abnormally dangerous conditions, 80% of them had been exposed to more radiation than 90% of workers in the entire U.S. nuclear industry, according to the National Institute of Occupational Safety and Health (NIOSH). *Id.* at 45.

The record in this case comprises over 23,000 pages of testimony and exhibits. The ALJD exhaustively documents that Respondent TNS expanded its production without installing engineering controls that would have contained, or shielded workers from, the large amounts of radioactive greensalt and DU dust that its manufacturing equipment created, and discusses the sources of contamination associated with each of Respondent's fifteen production processes. Together, these processes produced extraordinary amounts of airborne and surface radiation in the form of uranium dust, fumes, and vapors. *Id.* at 7-27. The decision also chronicles in great detail the inadequacies of the ventilation, suction, and mist-containment equipment that should have captured the contaminants before they entered the air the

workers breathed. *Id.* It documents rising exposure levels as measured by semi-annual in-vivo monitoring and bimonthly urine bioassays of employees and by the data from in-plant monitors that measured concentrations of airborne radiation in the atmosphere–all of which radiation measurements were required by the nuclear regulatory agencies. *Id.* at 43-47. The decision also documents the inadequacy of Respondent's decontamination procedures, both of its workplace and of its workers, who could not, in the overcrowded change room, wash off all the radioactive black dust that made them look like coal miners at the end of the day or monitor themselves for residual contamination before they went home to their families. *Id.* at 25-26. Respondent gave production quotas a far higher priority than worker health and, as its own consultant informed it, lacked commitment to a radiation safety program. *Id.* at 60-62.

As dust and exposure levels increased throughout the last half of 1980, the employees became increasingly alarmed about the conditions in which they were working, and increasingly active in voicing their concerns through their union representatives. Id. at 90-93. Monthly union-management health and safety tours documented contamination and faulty containment equipment in all production areas of the plant and the change rooms, and were posted for employees to read. *Id.* at 91-92. Month after month the same problems appeared without correction, increasing employees' alarm and frustration. *Id.* at 92. Respondent also ignored the recommendation of its health and safety manager that the penetrator shop be shut down until it could be decontaminated and proper engineering controls installed to contain the radioactive dust and mist. *Id.* at 50.

The ALJD also found that TNS failed to correct deficiencies in its engineering controls and radiation safety program, pointed out numerous times by the Tennessee Department of Radiological Health (TDRH), which, by

agreement with the United States Nuclear Regulatory Commission (NRC), had regulatory oversight of Respondent's facility. *Id.* at 39. Between late 1979, when Respondent started operating the penetrator shop, and May 1981, when the workers went on strike, TDRH inspected the plant several times and in each case reported serious and worsening airborne contamination problems, inadequate health and safety training of employees, and lack of commitment to the important regulatory principle that requires nuclear employers to keep exposures "as low as reasonably achievable" (ALARA). *Id.* at 78-84. Though TDRH had virtually no civil enforcement power short of shutting down the operation, which the Tennessee Attorney General had strongly advised against attempting, TDRH repeatedly found Respondent in violation of specific regulations and guidelines with respect to the dusty air and the use of respirators, and, most importantly, in violation of ALARA. *Id.* Under the ALARA principle TNS was not allowed to expose its employees to greater levels of radioactive dust than it could reasonably avoid, even if the exposures were not above the maximum permissible limits set by the regulatory agencies for internal doses. *Id.* at 38. As the principle informing all nuclear safety regulatory standards, ALARA required Respondent to install adequate radiation containment equipment on its production processes rather than place its employees in respirators; required it to hire an adequately trained radiation safety staff; required it to instruct its employees adequately about radiation protection; and required it diligently to correct the deficiencies observed by TDRH. *Id.* at 123-28. Respondent complied with none of these requirements. *Id.* As a result, even though Respondent placed its air monitors in positions that did not measure the air in the employees' breathing zone, and even though TDRH did not have access to Respondent's air quality data for the first quarter of 1981, the agency frequently expressed grave concerns about the employees' working conditions. *Id.* at 42, 78-84.

In January 1981, rather than installing engineering controls or cutting back on production to reduce the dust as TDRH had ordered and its health and safety manager had recommended, Respondent instituted a mandatory respirator program that required most of the employees to spend their entire workday in hot, heavy rubber masks through which they had difficulty breathing and which hurt their faces, impaired their vision, and prevented them from speaking. *Id.* at 49, 50. Nuclear regulations do not permit the use of respirators either as a substitute for engineering controls or for long periods of time. *Id.* at 53. In addition, Respondent's respirator program did not comply with regulatory standards with respect to physical examination of employees, fitting and sealing procedures, decontamination and storage of respirators, or allowing employees unrestricted breaks for relief. *Id.* at 50-52. Respondent intended to require the full-time use of respirators by virtually all of its employees for at least eight months. *Id.* at 61-62. The employees suffered so much from the masks that a number of them walked out. *Id.* at 93. The Union persuaded them to return until after contract negotiations that were soon to begin. *Id.*

Union-Company negotiations failed to resolve the employees' concerns. TNS rejected all of the Union's health and safety proposals. *Id.* at 92, 95-98. On April 30, 1981, the contract expired and the employees began a work stoppage. *Id.* at 101. In September, Respondent hired permanent replacements. *Id.* at 104-05. In February 1982, the Union made an unconditional offer to return to work, but Respondent refused to reinstate the workers except as vacancies occurred. *Id.*

The strike generated national attention and media coverage. The National Institute on Occupational Safety and Health (NIOSH) studied the employee exposure records and determined that exposure levels reflected "an inadequate margin of safety" and "were higher than doses sustained by workers in

other facilities in the U.S. nuclear industries." *Id.* at 45. The Oversight Subcommittee of the U.S. House of Representatives Committee on Science and Technology (the Gore Committee), chaired by then-Congressman Albert Gore, Jr., held a hearing on TNS at which internationally recognized radiation expert Dr. Paul Morrow testified that "all the biological data . . . would support the employees' contention of excessive uranium exposures and possible renal injury among workers" and added that "exposure conditions in the TNS plant have been excessive for at least 2 years." *Id.* at 120. As a result of the congressional hearing, the Tennessee General Assembly passed legislation that increased the civil enforcement powers of TDRH, and Respondent immediately undertook the installation of proper engineering controls, hired a competent health and safety staff, decontaminated its facility, enlarged its change rooms, and discontinued the respirator program. *Id.* at 27, 53, 125, 127-28.

In August 1982 the General Counsel of the National Labor Relations Board issued a complaint charging that Respondent had violated the Act by hiring permanent replacements for the TNS strikers, who, the complaint alleged, "ceased work in good faith because conditions at their place of employment were abnormally dangerous by virtue of their long-term exposure to unprecedented levels of uranium dust in conjunction with Respondent's inadequate health and safety programs, within the meaning of Section 502 of [the Act]." *Id.* at 1-2. The hearing before Administrative Law Judge Arline Pacht (ALJ) required more than sixty days of trial over eighteen months and generated a massive record. Because analysis of the dangers with which the employees had been threatened in the six months preceding the strike required understanding nuclear health physics, the ALJ admitted testimony from several nationally recognized medical and scientific experts in that field, as well as testimony from officials of the Tennessee Department of Radiological Health (TDRH), the transcript of the Gore hearing, the NIOSH

report, and the report of Respondent's own consultant. After allowing the parties a full year in which to brief the numerous complex issues litigated at the hearing, the ALJ issued a lengthy recommended decision in July 1987, upholding the complaint in all respects relevant here.

The case went to the NLRB for review, and the Board took five years to issue a decision dismissing the complaint.[3] *TNS, Inc.*, 309 N.L.R.B. 1348 (1992). In *OCAW v. NLRB*, 46 F.3d 82, 92 (D.C. Cir. 1995), the United States Court of Appeals for the District of Columbia remanded the case to the Board with instructions to issue a position upon which a majority of its decision makers could agree.

In 1999, four years later, the Board issued a supplemental decision and order that articulated its statutory interpretation of Section 502 to protect from permanent replacement employees who strike in the good faith belief, based upon objective evidence, that conditions at their workplace are abnormally dangerous. The Board also articulated the standard to be applied and the factors to be taken into account when assessing the claim of employees that their good faith belief was founded on objective evidence. Applying the standard to the facts, the Board adopted the findings of the ALJ in their entirety and agreed with all but one of her conclusions.[4] The Board ordered Respondent to reinstate the strikers and make them whole with respect to backpay, its standard remedy. Respondent petitioned the Sixth Circuit for review, and the Board petitioned for enforcement. On July 10, 2002, the court issued the decision that gives rise to this petition for certiorari.

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[3] The Board noted that "The Respondent's brief is 413 pages, the Charging Party's answer brief is 331 pages, [and] the General Counsel's answer brief in 128 pages . . . ." 309 N.L.R.B. at 1348 n.3.

[4] The Board shortened the backpay period the ALJ had recommended. *Pet. App.* 65a n.40.

B. Proceedings Below

1. *The Board Decision*

The Board's 1999 decision addressed the D.C. Circuit's instruction to determine "the applicability of section 502 in the context of occupational exposure to low-level radiation." *Pet. App.* 38a (internal quotation marks omitted). This issue was a matter of first impression for the Board.

The Board held that the General Counsel need not prove that employee working conditions were abnormally dangerous in fact, and it agreed with the ALJ that an employer's failure to correct or abate a reasonably-perceived danger may be used as evidence of abnormally dangerous conditions. *Pet. App.* 46a. The Board held that the abnormally dangerous threat caused by cumulative exposures need not have resulted in immediate injury. *Id.* The Board also held that "abnormal danger" in the context an employer's exposure of its employees to latent, cumulative toxins, means "beyond what might or should reasonably be expected in such a plant." *Pet. App.* 53a.

With respect to the kinds of evidence that will satisfy the requirement that the employees' perception of danger must be reasonably objective, the Board held:

> [W]e will consider whether employees' observations of their workplace and its practices as they related to exposure to toxic and radioactive substances reasonably led them to conclude that the dangers they faced in the workplace had reached a level beyond those reasonably to be expected in the industry and that their continued exposure to harmful substances subjected them to a risk of future serious illness or injury. We will also consider evidence of significant deviation from industry standards for a workplace safe for employees, expert testimony as

> to the risks faced by employees, and analyses of the level of exposure employees had reached at the time they walked out.

Pet. App. 53a-54a. The Board found that all the above indicators of risk were present at the TNS workplace and that the employees were reasonably alarmed for their health and safety. The Board also determined that scientific testing and regulatory oversight confirmed the employees' perception that Respondent was not willing to provide its workforce with an adequately safe workplace. *Id.* at 56a.

Having determined that the TNS employees engaged in a work stoppage within the meaning of Section 502, the Board held that TNS committed an unfair labor practice by hiring permanent replacements, and ordered that they be reinstated with backpay, its standard remedy.

2. *The Court of Appeals Decision*

On Respondent's petition for review and the Board's cross-petition for enforcement, the Sixth Circuit first deferred to the Board's interpretation that Section 502 applies to employees even in the absence of contractual no-strike provisions. *Pet. App.* 10a. Next, the court deferred to the Board's interpretation of the Act not to require that a workplace be abnormally dangerous in fact before employees may invoke the protections of Section 502. *Pet. App.* 14a. Third, the court upheld the Board's interpretation of the Act to prohibit permanent replacement of employees engaged in a work stoppage within the meaning of Section 502. *Id.*

Respondent raised several challenges to the Board's conclusion that the General Counsel had successfully proved first, that the TNS strikers believed in good faith that their working conditions were abnormally dangerous; second, that their belief was a contributing cause of the strike; third, that their belief was supported by ascertainable, objective evidence; and fourth, that the perceived danger posed an imme-

diate threat of harm to their health or safety. The court held that substantial evidence supported the Board's findings with respect to the first, second, and fourth factors. *Id.* at 22a-25a.

Although Respondent did *not* argue that the evidence weighed in its favor with respect factor three, the court disagreed with the Board's conclusion that the strikers' good faith belief was supported by ascertainable objective evidence.[5] *Id.* at 24a-25a. The court raised this issue *sua sponte*. *Id.*

First, the court considered it irrelevant that the air in the employer's facility contained uranium dust in excess of maximum permissible regulatory limits, because "the use of ventilators is better read as a response to potentially dangerous conditions rather than a dangerous condition itself." *Id.* at 28a. The Board and the ALJ had found that the unprecedented production of airborne contaminants, which had continued at TNS for over five months without abatement and was worsening all the time, was objective evidence of danger, clearly observable by the workers and the regulatory agency; that the employees' exposure data confirmed the danger; and that Respondent not only ignored the danger but tried to conceal it from TDRH. *Pet. App.* 37a, 41a-42a; ALJD at 12, 40-42.

With respect to the court's view that the respirator program constituted proper abatement of the excessive airborne contamination, the Board and ALJ concluded that the mandatory respirator program was a separate objective indicator of danger, because it was a clear signal that Respondent's engineering processes for containing airborne contaminants were out

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[5] Instead, Respondent argued that *as a matter of law* the Board could not find objective evidence of abnormal danger when the nuclear regulatory agencies that oversaw Respondent had not seen fit to close the plant or declare an emergency there. The court deferred to the Board's contrary interpretation. Pet. App. 20a-26a.

of control; because long-term respirator use is so difficult, painful, obtrusive, and unhealthy for employees that the regulatory agencies do not permit it as an acceptable substitute for engineering controls; and because at TNS the respirator program was managed in violation of applicable regulatory standards for respirator programs. *Pet. App.* 37a, 42a; ALJD at 48-55. Based on data from the workers' urine bioassays between January and April 1981, the ALJ also found that the respirator program did not protect the workers from excessive exposures. ALJD at 120.

The court also disagreed that the employees' abnormal whole-body exposures were dangerous when the exposure levels were still within regulatory limits "established with a considerable margin for safety" (*id.* at 11, 13), and the court disagreed that the employees' urine-uranium counts were evidence of danger because they did not exceed the DARCOM standard used by Respondent. The ALJ found that in 1980, 80% of Respondent's hourly production employees received whole body doses in excess of the doses received by 90% of other nuclear workers in the nation. ALJD at 44. She found that "'a reasonable person exercising great care in light of the best of available scientific knowledge would err on the side of caution by assuming no "safe" threshold exposure to atomic radiation. . . .'" *Id.* at 30 (quoting *Allen v. United States*, 588 F. Supp. 247, 362 (D. Utah 1984)). She also relied on the NIOSH report, which concluded that "the data from in-vivo monitoring suggests an inadequate margin of safety. . . . " *(id.* at 45) and which stated that Respondent had no justification for adopting the permissive DARCOM standard *(id.* at 120).

Finally, the court deemed significant that the regulatory agency had not taken action to shut down Respondent's operations, *Pet. App.* 31a-32a, notwithstanding that the ALJ had found, "The TNS employees had good reason to resort to self-help when the Agency charged with protecting them lacked the power or the will to do so." ALJD at 128.

In concluding that the objective evidence did not appear to support the employees' alarm at their exposure levels or justify a work stoppage, and that "the NLRB is not free to discount these facts completely and find evidence of abnormal dangers in the face of them without further support," *Pet. App.* 31a-32a, the court allowed that "there could be egregious evidence simply not addressed or understood by the regulator, or the regulator could have been moving too slowly for the circumstances, or it could be that the regulator was not fully apprised of or in control of the situation," *id.*

The ALJ, however, had found that the TDRH inspector was only vaguely familiar with the respirator regulations used by his Agency (ALJD at 48) and was unaware of the duration or breadth of the TNS mandatory respirator program (*id.* at 54). She found that TDRH knew that Respondent was misplacing air monitors and that Respondent refused TDRH access to air monitoring data. *Id.* at 42. She found that TDRH had a "regrettable incapacity to effectuate reforms." *Id.* at 127-28.

The court did not address the fifth evidentiary factor relied upon by both the ALJ and the Board in finding that the employees had objective evidence of abnormal danger, *viz.*, that "[r]espondent failed to comply diligently with governmental codes prescribing sound health physics practices." In that regard the ALJ and the Board found that Respondent's health and safety program was inadequate to protect employees to whom Respondent owed a duty, imposed by federal regulation, to keep exposures as low as reasonably achievable (ALARA). ALJD at 123. The ALJ cited numerous equipment and process failures with respect to which corrective action was feasible, deficiencies in Respondent's health and safety staff, and lack of management commitment to the radiation safety program as objective evidence that TNS was exposing its employees to abnormal dangers. *Id.* at 123-128.

The Sixth Circuit acknowledged that it would remand the case to the Board for further consideration of its *sua sponte* concerns, but for Respondent's contention that the order could not be enforced because of the Board's "inexcusable delay" in reaching a decision. *Pet. App.* 33a-34a. Respondent argued that because the litigation in this case has been ongoing for over 18 years, its potential liability for backpay is too great, and reinstatement of the strikers is too unrealistic, given (unnamed) changes in its operations. The court held that it did "not see a reasonable way to hold the Company responsible for damages accruing over all of this time . . . ." *Id.* at 34a. Accordingly, instead of remanding the case, the court vacated the Board's decision in its entirety. *Id.*

REASONS FOR GRANTING THE WRIT

THE SIXTH CIRCUIT'S VACATUR OF THE BOARD'S BACKPAY ORDER IS CONTRARY TO APPLICABLE PRECEDENTS OF THIS COURT AND IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

The Sixth Circuit vacated the Board's decision that the employer violated the Act on the sole ground that the Board's "inexcusable delay" rendered the Board's decision unreasonable. The holding by the Sixth Circuit flies in the face of this Court's controlling precedent, *NLRB v. J.H. Rutter-Rex Manufacturing Co., Inc.*, 396 U.S. 258 (1969), and has deepened an existing conflict among the circuits regarding the division of authority under the Act between the Board and reviewing courts of appeals. Given the reality that lengthy and delayed Board proceedings are common, it is important for the Court to resolve the conflict between the circuits and to address this often-repeated issue that affects the rights of innocent employees to redress their wrongs under the Act, notwithstanding delays by the agency empowered to enforce the Act's mandate.

1. This Court has previously addressed the effect of excessive delay in the NLRB administrative process in *Rutter-Rex*, which involved an unfair labor practice strike in which, as here, the employer was prohibited from hiring permanent replacements. At the conclusion of the strike, which began in 1954, the employer refused to reinstate all of the strikers who made an unconditional offer to return to work. In February 1956 the Board ordered reinstatement and backpay of the strikers, and the United States Court of Appeals for the Fifth Circuit enforced the Board's order in 1957. The Board did not conclude compliance proceedings until 1966, nine years later. Finding the Board guilty of "inordinate delay" to the prejudice of the company, "which had been 'lulled into the belief that the Board was satisfied and that no further action was to be expected,'" the Fifth Circuit modified the Board order to eliminate all back pay accruing after 1959. 396 U.S. at 261 (quoting *J. H. Rutter-Rex Mfg. Co. v. NLRB*, 399 F.2d 356, 363 (5th Cir. 1968)). Holding that the Court of Appeals had "exceeded the narrow scope of review provided for the Board's remedial orders when it shifted the cost of the delay from the company to the employees in this case," this Court reversed. *Id.* at 266.

As the *Rutter-Rex* Court noted, Section 10(c) of the NLRA commands that upon finding that an unfair labor practice has been committed, the Board must order the respondent "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of the Act." *Id.* at 262. Acknowledging its prior decisions recognizing the broad discretionary powers of the Board to fashion appropriate remedies, subject only to limited judicial review, the Court held, "[t]he legitimacy of back pay as a remedy for . . . unlawful failure to reinstate is beyond dispute" and "'should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.'" *Id.* at 263 (quoting *NLRB v. Seven-Up Bottling Co.*, 344 U.S.

344, 346-47 (1953)). The Court held that the back pay remedy is a tool provided to the Board by the NLRA not simply to punish an unfair labor practice "but also is a remedy designed to restore, so far as is possible, the status quo that would have obtained but for the wrongful act." *Id.* at 265.

Thus, even when the Board's "delay in the administrative process is . . . deplorable," the Court nevertheless concluded that a reviewing court of appeals does not have the authority to "shift [] part of that cost from the wrongdoing company to the innocent employees." *Id.* at 263-64:

> Wronged employees are at least as much injured by the Board's delay in collecting their back pay as is the wrongdoing employer. In view of 'the economic hardship caused by many years of undeservedly substandard earnings,' lengthy delays 'must render the back pay award a wholly inadequate and unsatisfactory remedy' to the employees for the company's refusal to reinstate them.

Id. at 264 (quoting *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 180 (2d Cir. 1965). Thus, the Court held, "the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers." *Id.* at 265.

2. Nearly two decades after *Rutter-Rex*, the District of Columbia Circuit rejected an employer's argument that laches permitted a court of appeals to vacate the Board's decision finding a violation of the Act, in spite of the unreasonable delay between the ALJ's decision and the Board's order, a delay that the employer contended rendered the backpay remedy prejudicial and unenforceable. *Southwest Merch. Corp. v. NLRB*, 943 F.2d 1354, 1358 (D.C. Cir. 1991). The D.C. Circuit held that where "there is no suggestion that the employees are to blame for the delay," the Board's remedy effectuates the purposes of the Act, as identified in

Rutter-Rex, and may not be disturbed by a court of appeals based on the court's notion of equity. *Id.* Indeed, the D.C. Circuit interpreted *Rutter-Rex* to "prohibit this use of judicial power," despite the importance of promoting prompt decisionmaking by the Board. *Id. See also Consolidated Freightways v. NLRB*, 892 F.2d 1052, 1059 (D.C. Cir. 1989) ("While we do not condone the Board's extraordinary delay, we conclude that enforcement of its order is appropriate because the remedy fashioned by the Board was well within its discretion, and our failure to enforce it would return the burden to the wrong shoulders.").[6]

By contrast, the Second Circuit—which the court below followed in vacating the Board's decision—has held that it may refuse to enforce a Board reinstatement and back pay award based on the Board's inexcusable delay in deciding the case upon review. *See Emhart Indus. v. NLRB*, 907 F.2d 372 (2d Cir. 1990). There, although the court recognized that "the majority view seems to have been that denying enforcement on the ground of delay alone unfairly 'punishes employees for the Board's nonfeasance,'" it nonetheless held that passage of time between the practices complained of and the

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[6] In a similar vein, the Seventh Circuit followed *Rutter-Rex* in rejecting an employer's argument that the Board's excessive delays justified setting aside interest on a backpay award arising from the employer's violation of the Act. *See NLRB v. Thill, Inc.*, 980 F.2d 1137, 1141 (7th Cir. 1992) (Posner, J.) ("The company argues that the amount of interest [on the back pay] is due largely to the Board's inexplicable delays in deciding the company's appeal from the administrative law judge's decision and the company's motion to reconsider the Board's decision in that appeal. That is true. The Board took eight years to decide those two matters; it should have taken far less time. But the company was not harmed, so far as the backpay order is concerned. The Board's delays meant that the company had that much more time to enjoy the use of the money that it should have given its workers back in 1981. The interest component of the backpay order merely transfers the fund built up by the Board's delays to its rightful owners.")

remedy granted by the Board could so change the underlying situation that a full reinstatement and back pay remedy would be contrary to the policies of the Act. *Id.* at 379-80 (quoting *NLRB v. International Assoc. of Bridge, Structural & Ornamental Ironworkers, Local 480*, 466 U.S. 258, 266 (1984). The Second Circuit's decision did not reference this Court's emphasis on the Board's right and duty to order backpay so to make wronged employees whole, *see Rutter-Rex*, 398 U.S. at 365, and did not even cite to the D.C. Circuit's decision in *Consolidated Freightways*, *supra*, in which the court read *Rutter-Rex* to prohibit such shifting of the cost of the Board's delay from the guilty employer to the innocent employees. *See also Olivetti Office U.S.A., Inc. v. NLRB*, 926 F.2d 181 (2d Cir. 1991) (limiting extent of the Board's backpay order to three years because of Board's excessive delay in processing case, basing decision on the impact upon the affected workers of the continuing bargaining relationship between the company and the union and finding that full enforcement would not effectuate the policies of the Act).[7]

3. Here, by vacating the Board's entire decision, the Sixth Circuit has done more than merely follow the Second Circuit's interpretation of *Rutter-Rex*, an interpretation that itself conflicts with the D.C. Circuit's application of this Court's precedent; rather, the Sixth Circuit has deepened the conflict, and has done so in a manner that violates this Court's precedent in *Rutter-Rex*. This is so because none of the prior cases that have refused to enforce a Board-ordered remedy because of inexcusable delay has gone so far as to vacate the Board's decision entirely—the step taken by the Sixth Circuit. Here, based on a finding that "[t]his court does not see a reasonable way to hold the Company responsible for damages accruing over all of this time, especially when its

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[7] *See also NLRB v. Thill, Inc.*, *supra*, 980 F.2d at 1142-43 (refusing to enforce Board's bargaining order based on court of appeals' "equitable discretion").

structure and business have changed in the interim," the Sixth Circuit determined to "VACATE the Board's *decision finding* TNS to have breached its obligations under § 502, rather than remanding it for further consideration." Pet. App. 34a. This application of inexcusable delay not only to deny the innocent employees the make-whole remedy provided as a tool to the Board to effectuate the Act's policy, but to invalidate the Board's finding of a violation altogether, thereby excusing an employer's violation of the Act, is an error demanding correction by this Court.

As the decisions above demonstrate—both those by courts of appeals permitting the Board's delay to cut short employees' remedies under the Act, and those by courts of appeals holding that they may not take such a step under the Act—the Board often takes many years to conclude a case. Here, the TNS employees have been waiting more than 18 years for a remedy. The question whether inexcusable delay on the Board's part permits a court of appeals to vacate the Board's finding of a violation of the Act is one that will recur and that will have a potentially devastating impact on all employees who count on the Board to vindicate their rights under the Act. Accordingly, the Court should accept certiorari to clarify the proper division of authority between the Board and the courts of appeals in enforcing the letter and the policies of the Act.

CONCLUSION

The Sixth Circuit's decision to vacate the Board's order because of the Board's inexcusable delay undermines one of the fundamental purposes of the Act, the protection of employees from victimization by their employer for engaging in legitimate concerted activity. The decision is in conflict with this Court's prior interpretation of the Act, and that of the D.C. Circuit. For these and all the foregoing reasons, the writ should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed July 10, 2002]

Nos. 99-6379; 00-5433

TNS, INC.,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

PAPER, ALLIED-INDUSTRIAL, CHEMICAL & ENERGY WORKERS INTERNATIONAL UNION,
Intervenor.

September 21, 2001, Argued
July 10, 2002, Decided

Before: KENNEDY, GUY, and BOGGS, *Circuit Judges.*

OPINION

BOGGS, Circuit Judge. This case is before the court upon the petition of TNS, Inc. ("TNS" or "the Company") to review, and the cross-application of the National Labor Relations Board ("NLRB" or "the Board") to enforce, an NLRB order finding that TNS breached obligations under Section 502 of the National Labor Relations Act ("NLRA") (29 U.S.C. § 143 (2002)) and ordering TNS to reinstate and pay back pay to employees affected by the Company's violation. Section 502 protects employees who take job action due to "abnormally dangerous" working conditions at their

place of employment. In 1981, at the expiration of the collective bargaining agreement they had with the Company, employees at TNS's Jonesboro, Tennessee plant walked out, claiming § 502 protection. When negotiations eventually failed, the Company hired permanent replacement workers; when the previous employees later sought reinstatement, the Company refused.

An infrequently used provision of the NLRA, the applicability, scope, and protections afforded to workers by § 502 are not facially clear. As a result, the Board, in the course of this case, has had to engage in several acts of statutory interpretation to clarify the meaning of § 502 before it could be applied to this set of facts. Having done so, the Board found that § 502 did apply to the 1981 job action and that TNS had violated § 502 by hiring permanent replacement workers and refusing to reinstate its previous employees.

On appeal, TNS makes several arguments in support of overturning the Board decision, including: (1) that the Board erred in interpreting § 502 to protect workers who were not prohibited from striking by either a statutory or contractual no-strike provision; (2) that the Board erred in interpreting § 502 to require only a good faith belief in dangerous conditions (supported by objective evidence) on the part of workers, as opposed to a more stringent requirement that abnormally dangerous conditions actually exist; (3) that the Board erred in interpreting § 502 to prohibit companies from permanently replacing workers who take job action pursuant to it; (4) that the Board erred in its factual determinations that the TNS employees believed in good faith that their working conditions were abnormally dangerous and that their belief was a contributing cause of the work stoppage; (5) that the Board erred in finding objective evidence of abnormal danger to exist in a plant regulated, monitored, and permitted to continue operation by the Nuclear Regulatory Commission

and its state counterpart; and (6) that the Board inexcusably delayed the proceedings such that this court should not enforce its award.

TNS's arguments to this court can fairly be divided into three categories. The first three arguments are challenges to the Board's acts of statutory interpretation. The fourth and fifth arguments are challenges to the Board's factual determinations. The final argument is an equitable one, asking this court to refuse to enforce the Board's award due to the Board's delay in this case. We reject TNS's statutory interpretation arguments because the Board's constructions of § 502 withstand the deferential review we are bound by Supreme Court precedent to give them. We reject in part and accept in part TNS's challenges to the Board's fact-finding. We also agree with TNS's inexcusable delay argument. Accordingly, we VACATE the Board's decision.

I

TNS manufactures armor-piercing projectiles called "penetrators" at its plant in Jonesboro, Tennessee. The principal ingredient in penetrators is depleted uranium ("DU"), a radioactive substance with carcinogenic properties when inhaled or ingested over long periods of time. DU also may pose a toxic risk to the kidneys.

The Paper, Allied-Industrial, Chemical and Energy Workers Union (the "Union") represented the employees at TNS. During the relevant time, a joint management-labor health and safety committee undertook monthly inspections of the plant and reported various problems with the levels of DU dust to which employees were exposed and with the functioning of safety procedures and devices intended to keep DU exposure low. On March 10, 1981, allegedly in response

to these problems and allegedly after the Company had failed to rectify them, the Union sent the following ultimatum to TNS:

> Employees will not return to work after April 30 until the terms which are on the health and safety report have been corrected and [the Company] is safe and healthy for the employees to work. This includes the items from past inspections as well as items which will be listed during the April inspection.

On March 24, 1981, the Union and TNS commenced negotiations over a new collective bargaining agreement. Initially, TNS made an offer including a wage increase, an extended layoff period, an extended probationary period for new workers and retention of the Company's existing health and safety clause in the contract (protecting health concerns). The Union responded with a lengthy new health and safety clause, a proposal for new safety inspections, and objections to extending the layoff and probationary periods, among other things. There were eight more meetings before the contract expired on May 1, 1981. During these meetings, the Union claims it was concerned only with the safety issues, while TNS claims the Union fought over economic issues.

On May 1, 1981, TNS employees who were members of the Union began a work stoppage at the expiration of their collective bargaining agreement. The Union alleged that the work stoppage was not a strike as defined by the NLRA, because it fell under the § 502 exemption for "quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees."[1]

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[1] Section 502 (29 U.S.C. § 143 (2002)) reads:

> Saving provision Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting

On July 7, 1981, TNS notified the employees engaged in the work stoppage that it would hire permanent replacements on July 16, 1981. The employees did not relent. On February 15, 1982 the Union made an unconditional offer to return to work on behalf of the employees engaged in the work stoppage. However, TNS refused to reinstate the employees.

On August 18, 1982, the Union filed a complaint with the NLRB, alleging that TNS engaged in unfair labor practices by hiring permanent replacement workers to replace employees engaged in the work stoppage and then refusing to reinstate the Union employees after the Union made an unconditional offer to return to work. TNS filed a motion to dismiss the complaint, relying on the fact that the complaint alleged that the employees were engaged in a work stoppage because of the "good faith belief that their conditions for work at their place of employment were abnormally dangerous" rather than for the reason allegedly required by § 502, that the employees ceased work "in good faith because conditions for work at their place of employment were abnormally dangerous." In other words, the Union alleged *belief* that the conditions were dangerous rather than that the conditions *were* dangerous. Judge Schlesinger, an Administrative Law Judge ("ALJ") of the NLRB, granted a motion to amend the complaint on August 11, 1983, and the Union changed its allegation accordingly. On August 18, 1983, TNS filed with the NLRB a request to appeal the granting of the motion to amend, which the NLRB rejected.

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of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act.

After the appeal, another ALJ (Judge Schlesinger was recused) undertook a hearing *de novo*, as per the NLRB order, and found TNS liable for violating § 502's requirements in an opinion dated July 31, 1987. More than five years later, on December 23, 1992, the Board issued a Supplemental Decision and Order wherein three out of four Board members voted to reverse the ALJ, dismissing all unfair labor allegations. *See TNS, Inc. and Oil, Chem. and Atomic Workers Int'l Union*, 309 N.L.R.B. 1348 (1992). However, the Board was fractured on the analysis of § 502, and no single reasoning commanded a majority.

The Union appealed and on February 14, 1995, the D.C. Circuit remanded the case to the Board, stating that it could not discern a Board position, and that the Board had failed to articulate an appropriate legal standard for the resolution of the case. The court held that "the Board must 'articulate a majority-supported statement of the rule that [it] will be applying now and in the future.'" *Oil, Chem. & Atomic Workers Int'l Union v. NLRB*, 310 U.S. App. D.C. 217, 46 F.3d 82, 92 (D.C. Cir. 1995) (quoting *United Food & Commercial Workers Int'l Union v. NLRB*, 279 U.S. App. D.C. 349, 880 F.2d 1422, 1436-37 (D.C. Cir. 1989)).

More than four years later, on September 30, 1999, the Board issued its *Second Supplemental Decision and Order*, 329 N.L.R.B. No. 61, reaching a decision contrary to its earlier position. The second decision found § 502 applicable to the job action, and it found that TNS had engaged in unfair labor practices by hiring permanent replacement workers and refusing to rehire the employees involved. In finding § 502 applicable to the present case, the decision set up a new four-part test for determining the applicability of § 502 in cases involving cumulative slow-acting dangers to employee health and safety:

> The General Counsel must demonstrate by a preponderance of the evidence that the employees believed in

> good faith that their working conditions were abnormally dangerous; that their belief was a contributing cause of the work stoppage; that the employees' belief is supported by ascertainable, objective evidence; and that the perceived danger posed an immediate threat of harm to employee health or safety.

TNS, Inc. and Oil, Chem. and Atomic Workers Int'l Union, 329 N.L.R.B. 602, 329 N.L.R.B. No. 61, 1999 WL 818610, at *2 (Sept. 30, 1999). As mentioned above, the decision ordered that TNS reinstate and provide back pay to the employees who took part in the work stoppage. It is from this order that TNS appeals to this court, and it is this order that the Board asks this court to enforce.

II

TNS's Challenges to the Board's Statutory Interpretation

We first address TNS's challenges to the Board's various acts of statutory interpretation. In reviewing NLRB interpretations of the NLRA, this court follows the standard set out by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). *See NLRB v. Webcor Packaging*, 118 F.3d 1115, 1119 (6th Cir. 1997) (applying *Chevron* to NLRB interpretations of the NLRA); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99, 134 L. Ed. 2d 593, 116 S. Ct. 1396 (1996) (applying *Chevron* to a Board decision). Under this standard, the court first asks "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If so, the court must give effect to Congress's interpretation. *Id.* at 842-43. However, if Congress has not clearly spoken to a question, this court is limited to determining "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. *Accord Holly Farms*, 517 U.S. at 398-99. In applying this "permissible construction" standard, this court must uphold

the Board construction if it is "permissible" and "reasonable," even if it is not the only construction the Board might have adopted and even if it is not the one that this court would have adopted if faced with the question *de novo*. *Chevron*, 467 U.S. at 843-44 and n.11.

1. Whether the Board erred in interpreting § 502 to apply in situations where there is no "no-strike" provision

TNS first argues that § 502 does not apply to this situation at all, because § 502 only applies to situations where employees are bound by either a contractual or implied "no-strike" provision. Accordingly, TNS contends that the Board erred in interpreting § 502 to cover situations—such as the present case—where the relevant employees are not bound by such a provision. There is both case law and logical support for the argument that § 502 should apply only to situations involving a "no-strike" provision, thereby making it a difficult question; however, since there is also support for the Board's interpretation, and because we are to review the Board's statutory interpretations under the deferential *Chevron* standard, we must affirm the Board's interpretation.

TNS cites several cases as support for the proposition that § 502 applies only in the context of a "no-strike" provision. *See, e.g., Whirlpool Corp. v. Marshall*, 445 U.S. 1, 18 n.29, 63 L. Ed. 2d 154, 100 S. Ct. 883 (1980) (the "effect of this section is to create an exception to a no-strike obligation in a collective-bargaining agreement."); *Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368, 385, 38 L. Ed. 2d 583, 94 S. Ct. 629 (1974) ("This section provides a limited exception to an express or implied no-strike obligation," thereby insulating participants from injunctions, liability for damages, or termination when a cessation of work is necessary "to protect employees from immediate danger."); *Plain Dealer Publ'g Co. v. Cleveland Typographical Union No. 53*, 520 F.2d 1220, 1228 (6th Cir. 1975) ("This recognition of a right to refuse to work provides a limited

exception to an express or implied no-strike obligation." (citing *Gateway Coal*)); *NLRB v. Tamara Foods, Inc.*, 692 F.2d 1171, 1183 (8th Cir. 1982) (finding § 502 inapplicable in a case where there was no collective bargaining agreement); *Knight Morley Corp.*, 116 N.L.R.B. 140, 146 (1956), enforced, 251 F.2d 753 (6th Cir. 1957) (holding that § 502's purpose was to give employees a right to walk off the job because of abnormally dangerous conditions "even in the face of a no-strike clause in their contract with an employer").

Further, there is logical support for the idea that § 502 only applies when employees are faced with either a contractual or implied "no-strike" provision. If § 502 were so interpreted, the section would exempt workers who quit work out of concern for their safety from the injunctions and damage actions that usually follow work stoppages in contravention of these provisions. One might argue that an employee not so constrained is free to make a decision as to whether he wants to work in a potentially dangerous situation without the threat of an injunction or damage action, and so he is not in need of the protections of § 502.

However, as both sides admit, there is nothing in the legislative history of either § 502 or the NLRA more generally that addresses "no-strike provisions." As explained above, in the absence of an express congressional imperative one way or the other, the *Chevron* standard serves to protect the Board's interpretation as long as it is "reasonable." *See Chevron*, 467 U.S. at 843-44. In this case, the Board has a reasonable answer to almost all of the support cited by TNS. First, all of the cases discussing the issue, except *Tamara Foods*, 692 F.2d at 1183, were dealing with situations where either an express or implied "no-strike" provision was in effect. It is a different thing to say that § 502 is an exemption to "no-strike" provisions when there is a no-strike provision than it is to say that § 502 applies *only* when there is a "no-strike" provision. The only case that even arguably says

"only" is the Eighth Circuit's *Tamara Foods* decision. However, this case is distinguishable in that, although it discusses no-strike clauses and § 502, it actually finds the section inapplicable because there was no "collective bargaining agreement," not because there was no "no-strike" clause. *Ibid.* Further, *Tamara Foods* merely quotes without discussion the language of *Whirlpool* suggesting that § 502 is an exception to a no-strike provision (which, as already mentioned, makes its assertion in a case where a "no-strike" provision *was* in effect). *Ibid.*

From a logical standpoint, there is also an argument favoring the Board's position. If § 502 is interpreted to provide job protection to employees engaged in a protected work stoppage, it would seem somewhat anomalous to provide this protection to unionized employees subject to a collective bargaining agreement that includes a no-strike clause but deny it to unionized employees not working under such a collective bargaining agreement and to all non-unionized employees. Further, while it is true that several administrative law judges have held § 502 to be limited in this way, up until now the Board has expressly reserved ruling on the issue. See *Beker Industries Corp.*, 268 N.L.R.B. 975, 975 n.1 (1984); *Gibraltar Steel Corp.*, 273 N.L.R.B. 1012, 1012 n.2 (1984). Now, however, the Board has so ruled and this court is bound to uphold its determination under the *Chevron* standard of review, because Congress has not spoken on the issue and the Board's interpretation is reasonable.

2. *Whether the Board erred in interpreting § 502 to require only a good faith belief on the part of the employees that abnormally dangerous conditions exist, as opposed to requiring that abnormally dangerous conditions actually exist*

The Board's newly adopted test for § 502 applicability is premised on the idea that § 502 requires a good faith belief in

the existence of abnormally dangerous working conditions and that the belief be supported by ascertainable, objective evidence. TNS argues that this is incorrect—that abnormal danger-in-fact is required before § 502 will apply to a work stoppage. While, again, there are arguments supporting TNS's interpretation of § 502, *Chevron* again compels this court to affirm the Board's contrary interpretation.

In support of its position, TNS states that the Supreme Court in *Gateway Coal* dictated an approach requiring such a standard. It is true that *Gateway Coal* can be read this way, as it requires "objective evidence that [abnormally dangerous] conditions *actually obtain*." *Gateway Coal*, 414 U.S. at 386 (emphasis added). *Gateway Coal* goes on to state that "a union seeking to justify a contractually prohibited work stoppage under § 502 must present 'ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists.'" *Id.* at 386-87 (quoting *Gateway Coal Co. v. United Mine Workers of America*, 466 F.2d 1157, 1162 (3d Cir. 1972) (Rosenn, C.J., dissenting)).

TNS also cites *NLRB v. Fruin-Colnon Construction Co.*, 330 F.2d 885, 892 (8th Cir. 1964), which held that employees leaving their jobs because of dangerous conditions risk discharge because of their no-strike clause "should proof later of the physical facts fail to support their prior belief." Further, TNS points out that the Board has followed this view in the past, holding that "it is well settled that Section 502 applies only where it has been objectively established that the working conditions are abnormally dangerous." *Goodyear Tire & Rubber Co.*, 269 N.L.R.B. 881, 881 (1984) (Board overruling an ALJ decision holding that § 502 protects employees with only a good faith belief that abnormally dangerous conditions exist).

However, there are again responses to TNS's arguments. For example, though the language quoted above from *Gateway Coal* seems to support TNS's reading of § 502, *Gateway*

Coal actually deals with a situation where a striking union claimed § 502 protection based solely on their claim of subjective belief of abnormal danger. The union offered *no* objective evidence to back up this claim, and it was on this basis that the Court held that § 502 did not apply. *Ibid.* As for the Eighth Circuit's *Fruin-Colnon* decision, this too was a situation virtually devoid of any evidence of abnormal danger. *See Fruin-Colnon*, 330 F.2d at 892 (rejecting § 502 applicability when evidence of abnormal danger was "based upon isolated testimony of the alleged discriminatees and unreasonable inferences which are unsubstantial considering the record as a whole").

Further, while there is case law tending to support TNS's reading of § 502, there is also case law that clearly supports the Board's interpretation. For example, this circuit has held that the important question in a § 502 situation is not whether abnormal danger actually existed, but whether it was shown by objective evidence that the employees' working conditions "might reasonably be considered 'abnormally dangerous.'" *Knight Morley*, 251 F.2d at 759. In so holding, this court wrote that § 502 "expressly limits the right of management to require continuance of work under what the employees in good faith believe to be 'abnormally dangerous' conditions." *Ibid.*

There is also persuasive authority to support the Board's position. For example, in *Banyard v. NLRB*, 164 U.S. App. D.C. 235, 505 F.2d 342, 348 (1974), the District of Columbia Circuit rejected the notion that § 502 sets up an unsafe-in-fact standard. Instead, the *Banyard* court explained that the issue in § 502 cases is whether, "in the Board's own language, 'the actual working conditions shown to exist by competent evidence might in the circumstances reasonably be considered "abnormally dangerous."'" *Ibid.*

Finally, although the Board has used language in prior cases suggesting the use of a danger-in-fact standard, the

Board has also found § 502 applicable to work stoppages where it was determined that the complained-of working conditions were not in fact abnormally dangerous. However, objective evidence of abnormal danger was required to support the employees' belief. *See Roadway Express*, 217 N.L.R.B. 278, 280 (1975) (an experienced truck driver's opinion that a truck was unsafe, when that opinion was shared by other drivers, was "objective enough" evidence under § 502 "to lead a person to reasonably determine that he should not drive such a truck"); *Redwing Carriers, Inc.*, 130 N.L.R.B. 1208, 1209 (1960) ("What controls is not the state of mind of the employee . . . concerned, but whether the actual working conditions shown to exist by competent evidence might in the circumstances reasonably be considered 'abnormally dangerous.'").

In short, again, there is evidence to support the interpretations adopted by both sides. Therefore, the question comes down to one of standard of review. TNS argues that the Board is not entitled to deference in its statutory construction here, because it contends Congress has spoken on this issue. The Company points to the text of § 502, which provides its protection to the "quitting of labor by an employee or employees in good faith *because of* abnormally dangerous conditions for work." According to TNS, this language clearly expresses Congress's intent that § 502 only cover cases where abnormally dangerous conditions actually exist.

While it is true that Congress *could* have drafted a clearer expression of its intent, it is not true that it did in the present case. The text of § 502, taken as a whole, is open to both interpretations, as is evident from the extensive case law discussed above attempting to interpret the statute (and coming out on both sides). As the Supreme Court has explained, "if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give

effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. In this case, Congress's intent on this specific issue is ambiguous, and therefore this court must apply the deferential *Chevron* standard of review to the Board's interpretation. Since the construction put forward is both permissible and reasonable, this court must uphold the Board's determination that § 502 requires only a good faith belief—supported by ascertainable, objective evidence—in the existence of abnormally dangerous working conditions.

3. Whether the Board erred in interpreting § 502 to prohibit companies from permanently replacing workers who quit work because of abnormally dangerous conditions

TNS's final challenge to the Board's statutory interpretation is that the Board incorrectly interpreted § 502 to preclude employers from permanently replacing workers engaged in a § 502 work stoppage. TNS argues that an employer should have the same right to replace workers who participate in a § 502 work stoppage as it does to replace any other employees who engage in work stoppages not caused or prolonged by employer unfair labor practices. *See NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46, 82 L. Ed. 1381, 58 S. Ct. 904 (1938) (holding that an employer may replace striking workers with others to carry on business so long as the employer is not guilty of unfair labor practices). *See also Belknap, Inc. v. Hale*, 463 U.S. 491, 504 n.8, 77 L. Ed. 2d 798, 103 S. Ct. 3172 (1983) (holding that absent evidence of an independent unlawful purpose, it is to be presumed that an employer's motive in permanently replacing its employees is to serve the legitimate business interest of continuing its operation). TNS claims that because it has not

engaged in an unfair labor practice (governed by § 8 of NLRA), it should be permitted to permanently replace workers striking under § 502.

This argument fails in this court, once again, because of the *Chevron* doctrine. In the absence of a clear textual description of what protections are to be offered to employees engaged in § 502 actions, the Board has interpreted § 502 to protect covered employees from being permanently replaced. Since this interpretation is supported by logic, it is reasonable and must be upheld.

This interpretation is supported by reason in several ways. First, as the Court recognized in *Gateway Coal*, 414 U.S. at 387, § 502 confers "special protection" on employees who quit work in the good faith belief that their workplace is abnormally dangerous; however, this protection is meaningless if companies can simply replace these employees as if they were normal economic strikers. Though this court has not discussed this issue specifically, the Board's determination that employers may not permanently replace employees who engage in § 502 job actions conforms with this court's holding that "when a work stoppage properly results from abnormally dangerous working conditions, an employer cannot resort to the weapons available to him in an economically-motivated work stoppage." *Clark Eng'g & Constr. Co. v. United Bhd. of Carpenters & Joiners*, 510 F.2d 1075, 1080 (6th Cir. 1975).

More generally, the Supreme Court has held that a company's refusal to reinstate strikers is unlawful unless it is based on a legitimate and substantial business justification. *See NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378, 19 L. Ed. 2d 614, 88 S. Ct. 543 (1967). As TNS points out, the Court in *Mackay Radio*, 304 U.S. at 345-46, held that permanent replacement of economic strikers is a legitimate business purpose. However, the Board concluded as a matter of statutory interpretation that this is not legitimate in the case

of a § 502 action, because it would defeat part of the purpose of allowing workers faced with abnormal danger to take job action if they could simply be replaced with new workers who may not be aware of the dangerous conditions. As mentioned, Congress has not spoken on this issue and the Board's interpretation is reasonable; as such, we are bound by *Chevron* to uphold the Board's interpretation.

TNS's Challenges to the Board's Application of its § 502 Test to the Facts of the Present Case

This court having rejected TNS's various arguments for why the Board's four-part test is not a permissible interpretation of § 502, we now turn to TNS's challenges to the Board's application of its test to the facts of this case. As noted above, in determining that § 502 applied to the TNS employees' work stoppage, in a situation involving "cumulative, slow-acting dangers to employee health and safety," the Board held that the NLRB General Counsel had successfully proven by a preponderance of the evidence that (1) the employees believed in good faith that their working conditions were abnormally dangerous; (2) the belief was a contributing cause of the work stoppage; (3) the employees' belief was supported by ascertainable, objective evidence; and (4) the perceived danger posed an immediate threat of harm to employee health or safety. *TNS*, 329 N.L.R.B. 602, 1999 WL 818610, at *2. However, with respect to the last requirement, the Board noted that, due to the nature of cumulative, slow-acting dangers, "there will probably not be a single moment when 'immediate' departure from the workplace is obviously necessary." 329 N.L.R.B. 602, *Id.* at *11. Defined so loosely, the fourth requirement is not difficult to fulfill; possibly for this reason, TNS principally argues that the Board erred in finding that the first, second, and third requirements were fulfilled.

On review by this court, findings of fact made by the Board are conclusive if supported by substantial evidence on the

record considered as a whole. *See* 29 U.S.C. § 160(f) (2002). Though deferential, this standard of review is not trivial. As the Supreme Court has pointed out, it is not enough merely to verify that there is evidence to support the Board's determination "without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487, 95 L. Ed. 456, 71 S. Ct. 456 (1951). Instead, the review must also "take into account whatever in the record fairly detracts from its weight." *Id.* at 488. The Supreme Court has described this standard of review as "requiring a court to ask whether a 'reasonable mind might accept' a particular evidentiary record as 'adequate to support a conclusion.'" *Dickinson v. Zurko*, 527 U.S. 150, 162, 144 L. Ed. 2d 143, 119 S. Ct. 1816 (1999) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229, 83 L. Ed. 126, 59 S. Ct. 206 (1938)).

4. Whether the Board erred in its factual determinations (1) that the TNS employees believed in good faith that their working conditions were abnormally dangerous and (2) that their belief was a contributing cause of the work stoppage

The first two factual challenges made by TNS are best addressed together, as it is impossible to separate the proof of one from the proof of the other. Therefore, we first look at whether there is substantial evidence on the record as a whole to support the Board's factual findings that the TNS employees believed in good faith that their work conditions were abnormally dangerous and that this belief was a contributing cause of the work stoppage. We find that there is such evidence.

TNS makes a well-documented argument that the dangerous working condition claims were only a pretext for the striking employees' actual, economic motivations. In support of this contention, TNS points to the timing of the job action (at the expiration of the employees' collective bargaining

agreement, at a time when negotiations with management seemed stalled). The Company also alleges that it received no official challenges by employees or the Union to health and safety conditions at the plant until after the March 1981 strike vote. Further, the Company cites Union discussions and graffiti placed on TNS property as evidence that the Union was focused on economic matters, and not workplace safety, at the time of the vote. Finally, the Company alleges that rank and file Union members were unaware of much of the "objective evidence" of danger that the Board cites, and so even if there were such evidence, it could not have been a motivating factor for the walkout.

The picture painted by the Board's proffered evidence could not be more different. The Board cites frequent safety inspections and reports of complaints made by the Union since October 1980 as evidence of the employees' concern for their safety. Further, the Board notes that the ultimatum sent by the Union to the Company on March 10, 1981 stated that if the employees walked out, it would be because of alleged dangers in the workplace. The Board cites numerous discussions at Union meetings and numerous worries expressed by employees about the dangers caused by DU dust in the factory. The Union in its brief states:

> In the period leading up to the work stoppage, employees knew that, due to the Company's woefully inadequate dust control program, they were ingesting inordinate quantities of DU, and that several of them were experiencing disturbing medical symptoms associated with kidney dysfunction. TNS itself began to inform some employees that they had high levels of uranium in their urine. . . . The step TNS took in response to these developments . . . was to implement an

obviously inadequate respirator program, which only made it more apparent that the employees' health was in grave peril.[2]

In short, the evidence is strongly set out by both sides in twenty years of documents, transcripts, and testimony. However, given the standard of review that constrains this court in examining factual determinations of the Board, the

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[2] Another description (though an admittedly one-sided one), based largely on evidence in the record, can be found in C. John Cicero, *TNS, Inc.—The National Labor Relations Board's Failed Vision of Worker Self-Help to Escape Longterm Health Threats from Workplace Carcinogens and Toxins*, 24 Stetson L. Rev. 19, 22 (1994):

> At the end of a workday in the company's foundry, the employees' faces and other exposed portions of their bodies were black from the dust, soot, and smoke. During one phase of the production process, employees packed depleted uranium in the form of "greensalt," a powdery, heavy radioactive compound, into pots by hand. The radioactive mixture routinely flew up from the pots and settled into employees' ears, nostrils, and mouths. Many employees discharged black mucus when they sneezed or blew their noses. An operator testified that "the black soot would make his hair stiff as brillo; he wore plugs to prevent dirt from entering his ears." Another employee kept a toothbrush at his work station to remove dusty particles which lodged in his teeth. Yet another testified how she "scrubbed her skin with a buffing pad at the end of the day to remove the black specks from her pores." When she asked TNS' Resident Safety Officer, Jim Barlow, whether tests could be performed to sample the black material that infiltrated the workers' nostrils, he told her that "such a test would be too costly." TNS' plant engineer acknowledged "that at the end of the workday, the foundry employees looked like coal miners."
>
> Conditions were no better in the penetrator shop. One employee testified that with the shop door opened, he "could see dust motes suspended in the air." He could not, however, see "the invisible concentrations of alpha particles which emanated from the airborne contaminants." Smoke from the furnace and the forge contributed to the "hazy and contaminated atmosphere," an atmosphere cooled by "mists bearing uranium metal specks which sprayed the operators' faces and clothing."

mere fact that evidence goes both ways does not help TNS's case. Instead, in order to overturn the Board's factual findings with respect to the employees' beliefs and motivations, we would have to be able to say that the Board's determination is not supported by "substantial evidence on the record considered as a whole." 29 U.S.C. § 160(f) (2002). We are unable to do that here.

5. Whether the Board erred in finding objective evidence of abnormal danger to exist in a plant regulated, monitored, and permitted to continue operation by the Nuclear Regulatory Commission and its state counterpart

As mentioned above, in the course of finding that § 502 applied to the work stoppage at TNS, the Board found that the employees' good faith belief in the existence of abnormally dangerous conditions was supported by "ascertainable, objective evidence" of abnormal danger. The Board did this in a situation where, although the relevant nuclear regulatory agencies sent non-compliance letters and cited violations, the agencies did not see an immediate and serious danger warranting decisive action. With that in mind, TNS argues in its final challenge to the Board's factual findings that this court should overturn the Board's finding that evidence supported the employees' belief in abnormal danger.

TNS can be read to be making two different arguments on this score, and we will deal with each in turn. First, TNS argues that, as a matter of law, the Board can not find that objective evidence supports the employees' belief in abnormal danger when the relevant nuclear regulatory agencies are actively monitoring the Company's operations and find no cause to order closure or any type of emergency remedial action. We reject that argument. Alternatively, TNS might argue that, in the present case and given the monitoring and inaction by the regulatory bodies, the actual findings of facts relied upon by the Board as providing evidence

supporting the employees' belief were insufficient to support the Board's finding. Utilizing the standard of review with which this court examines NLRB fact-finding, this argument would require us to hold that the Board's determination was not supported by "substantial evidence on the record considered as a whole." 29 U.S.C. § 160(f) (2002). We agree with this argument.

We first address TNS's argument that the Board could not, as a matter of law, find objective evidence to support the employees' belief in the face of regulatory non-action. However, before addressing this argument, it is necessary to review the nuclear regulatory scheme in general and the agencies' actions with respect to TNS's operations.

As part of the complete federal preemption of nuclear safety, *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 249, 78 L. Ed. 2d 443, 104 S. Ct. 615 (1984) (federal government occupies entire field of nuclear safety); *Pac. Gas and Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 208, 75 L. Ed. 2d 752, 103 S. Ct. 1713 (1983) ("the safety of nuclear technology [is] the exclusive business of the Federal Government"), Congress delegated exclusive licensing and regulatory authority to the Atomic Energy Commission, which was replaced by the Nuclear Regulatory Commission (NRC) in 1974. *See Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 63, 57 L. Ed. 2d 595, 98 S. Ct. 2620 (1978). Specifically, Congress gave the NRC authority to regulate nuclear materials to protect "public health and safety." 10 C.F.R. § 1.11(b) (2002).

In turn, pursuant to 42 U.S.C. § 2021, Congress provided that the NRC may delegate certain aspects of nuclear regulation to states. *See* 42 U.S.C. § 2021 (2002). Under this provision, state regulatory agencies may assume regulatory authority for low-level radiation, subject to NRC regulations. Tennessee became such an "agreement state" in 1965 and, as a result, the Tennessee Division of Public Health, Division of

Radiological Health (TDRH) regulates facilities such as TNS, although it utilizes NRC guidelines to accomplish the regulation. The TDRH conducts periodic inspections of the nuclear facilities it regulates to ensure that they are in compliance with regulations, and NRC officials join TDRH inspectors on occasion. The TDRH has the legal authority to close a facility by suspending or revoking its license to operate in the state.

From 1979 onwards, the TDRH conducted semi-annual inspections of TNS's operations. There is conflict between the parties as to whether TNS was in full compliance with NRC and TDRH regulations. However, if nothing else, there seems to be no contention that the agencies found conditions at the plant to be immediately dangerous, as evidenced by the fact that they might have taken decisive regulatory action against the Company and did not. Even the Board recognizes this, having quoted in its first decision language from the report of the last TDRH inspection of the TNS plant prior to the job action: "inplant site is not as contaminated as noted several years ago . . . . There are many areas that need improvement and constant updating but it appears that at the present time no crisis or eminent [sic] threat to health and safety exists." *TNS*, 309 N.L.R.B. at 1351 (quoting TDRH Inspection Report from March 9-10, 1981 inspection).

TNS argues that where an expert agency, monitoring the situation, and having authority to shut down the workplace or remove employees from their jobs for safety or health reasons, has not taken such action, appropriate deference to that agency's expertise requires that the Board apply a presumption that no "abnormal danger" exists.

The Board responds that it did not find that working conditions were in fact abnormally dangerous; rather it found that employees possessed a good faith belief that their workplace was abnormally dangerous and that objective evidence supported that belief. So, as the Board states in its brief to this

court, even if the NRC and the TDRH found that no abnormal danger existed at TNS, the NLRB "still would not have been compelled to dismiss the complaint, provided that the objective record evidence before it showed that conditions at the time of the work stoppage might reasonably be considered abnormally dangerous." NLRB Br. at 37. Further, the Board contends that it did not, by its finding, make the findings of the NRC and the TDRH irrelevant; on the contrary, the Board used citation letters from the TDRH, charging TNS with violations of radiation safety standards, as the basis for its finding that there was enough objective evidence to support the employees' good faith belief.

In general, courts have held that scientific regulatory agencies such as the NRC should be given extreme deference within their area of expertise. *See Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103, 76 L. Ed. 2d 437, 103 S. Ct. 2246 (1983); *Fed. Power Comm'n v. Florida Power & Light Co.*, 404 U.S. 453, 463, 30 L. Ed. 2d 600, 92 S. Ct. 637 (1972); *Browning-Ferris Indus. v. Muszynski*, 899 F.2d 151, 160 (2d Cir. 1990) ("Courts should be particularly reluctant to second-guess agency choices involving scientific disputes that are in the agency's province of expertise."). As one amicus brief pointed out, this deference promotes efficiency, avoids unnecessary duplication of effort and helps to avoid the situation where an agency without expertise in an area countermands the determinations of agencies with that expertise, and thereby frustrates broader purposes. *See* LPA, Inc. and the Nat'l Ass'n of Mfrs. Br. at 7-8. As an example, in speaking particularly of the NRC, the Sixth Circuit has joined with almost every other circuit in holding that NRC safety regulations conclusively establish the duty of care owed by defendants in radiation safety personal injury cases governed by the 1998 amendments to the Price-Anderson Act. *See Nieman v. NLO, Inc.*, 108 F.3d 1546, 1552-53 (6th Cir. 1997).

As for the Board, it has in the past accepted agencies' standards and regulations governing the agencies' areas of concern in determining whether a claim of abnormal danger was proven by objective facts. *See Goodyear*, 269 N.L.R.B. at 881 (Board rejected § 502 claim of abnormal danger, relying in part on manufacturer's statements that federal regulatory agencies had not restricted use of product); *Daniel Constr. Co.*, 264 N.L.R.B. 770 (1982) (Board affirmed that employee's refusal to work in radiation area did not fall under § 502, because no objective evidence was found to support danger claim and there was apparent full federal regulatory compliance); *Baker Marine Corp.*, 258 N.L.R.B. 680 (1981) (Board rejected § 502 claim of abnormal danger after ALJ noted procedures within OSHA safety standards).

However, in the present case, the Board did not find "abnormally dangerous" a condition that the NRC did not find dangerous. It found merely that there was objective evidence to support the employees' belief that their working conditions were abnormally dangerous. There is a practical concern that this is merely splitting hairs and that by permitting employees § 502 protection for work stoppages in cases where regulatory agencies have not seen the need to act decisively, the Board would effectively be setting higher (and different) standards for nuclear safety than those set by the expert agencies. One might argue accordingly that companies would then be forced to continue to comply with the nuclear agencies' requirements, but at the same time make sure that - despite the companies' compliance - employees were not able to build a credible case that abnormal danger existed, thereby providing a basis for a protected job action (which, of course, might be used manipulatively to secure unrelated concessions). Some may argue that the NRC's bright line rules and radiation guidelines would therefore be undermined by companies having to worry not just about the NRC but also about the NLRB in their radiation programs. However, this practical consideration is for the time being merely

speculative, as the Board argues rightly that it did not make a decision contrary to NRC findings, but merely found objective evidence (in part based on NRC & TDRH non-compliance letters) to support the employees' good faith belief that their workplace was abnormally dangerous.

Further, leaving policy decisions aside, there is at least some support for the Board's determination that it need not defer completely to the NRC. In the Supreme Court's *Whirlpool* decision, 445 U.S. at 8-11, the Court was asked to decide the validity of a rule promulgated by the Secretary of Labor, which allowed workers to refuse to engage in work they in good faith believed to be dangerous. Arguments against the rule included the facts that the Occupational Safety and Health Act (OSH Act) did not explicitly provide for this type of protected refusal, and that the employees already had an avenue for redress of safety concerns through the OSH Act by direct complaint to OSHA, the agency charged with enforcing the act. The Court found that, despite the existence of an administrative agency charged with evaluating safety, there were times when it would be necessary for employees to take matters into their own hands. Discussing the validity of the rule allowing employees to refuse certain jobs, even when OSHA had not prohibited workers from performing them, the Court wrote:

> Circumstances may sometimes exist in which the employee justifiably believes that the express statutory arrangement [the OSH Act] does not sufficiently protect him from death or serious injury. Such circumstances will probably not often occur, but such a situation may arise when (1) the employee is ordered by his employer to work under conditions that the employee reasonably believes pose an imminent risk of death or serious bodily injury, and (2) the employee has reason to believe that

> there is not sufficient time or opportunity either to seek effective redress from his employer or to apprise OSHA of the danger.
>
> Nothing in the Act suggests that those few employees who have to face this dilemma must rely exclusively on the remedies expressly set forth in the Act at the risk of their own safety. But nothing in the Act explicitly provides otherwise. Against this background of legislative silence, the Secretary has exercised his rulemaking power under 29 USC §§ 657(g)(2), and has determined that, when an employee in good faith finds himself in such a predicament, he may refuse to expose himself to the dangerous condition, without being subjected to "subsequent discrimination" by the employer.

Whirlpool, 445 U.S. at 10-11. While there are certainly differences between this case and *Whirlpool* (for example, here there is no express rule from the Secretary of Labor permitting the action based on good faith belief and the provisions are under different statutes with different purposes and goals), this case represents analogous support for the proposition that the Board can find a permissible basis for employees to engage in a work stoppage based on radiation safety even in the absence of decisive action by the NRC.

Having rejected the proposition that the NLRB can not, as a matter of law, find that objective evidence supports employees' belief in abnormally dangerous working conditions when relevant regulatory agencies have chosen not to take immediate or emergency action, we must consider whether the Board's factual finding of objective evidence in *this* case is supported by substantial evidence.

As would be expected in a case with the complicated procedural history of this one, there is extensive evidence in the record. However, in finding that its third requirement was fulfilled, namely that objective evidence supported the TNS

employees' good faith belief that their workplace was abnormally dangerous, the Board merely cited without explanation four factors listed by the ALJ in her decision:

> (1) air quality at the facility exceeded MPC [maximum permissible concentration] at 11 work stations for at least the last quarter preceding the strike; (2) the protracted use of respirators by a substantial number of employees was deleterious to their health; (3) the employees' average whole body uranium exposures were far greater than those typical for the nuclear industry; and (4) that repeated and excessive uranium-in-urine levels indicated serious risk of kidney damage.

TNS, 329 N.L.R.B. 602, 1999 WL 818610, at *12. The Board held that this evidence "constitutes objective proof supporting [the employees'] belief that their workplace had become too unsafe an environment to continue working." *Ibid.*

One must go back to the ALJ's decision in this case to fill out the details of the facts cited by the Board as supporting the employees' belief that their workplace was too dangerous to work in.

The first piece of evidence cited by the Board dealt with the amount of DU dust in the facility's air. Since the DU used in the manufacturing process at TNS is a low-level radioactive material, the TDRH set a standard for the MPC of airborne DU particles, defined as the amount of airborne radioactive material beyond which no worker is to be exposed for 40 hours per week for 13 weeks. Though there is a great deal of back and forth in the record with respect to its significance, it is undisputed that both company records and TDRH inspections revealed DU dust in excess of MPC at some workstations in the TNS plant.

However, the second piece of evidence cited by the Board, that employees were wearing respirators, was in direct response to the high levels of DU dust found to be in the air.

Engineering controls, such as ventilation equipment, should keep the amount of DU dust in the air below MPC. In the event that these controls were ineffective at keeping dust below MPC, TDRH regulations called for the use of respirators to keep the dust out of employees' lungs. In January 1981, TNS had instituted a program of respirator use for areas of its plant with excessive dust levels. New equipment to reduce dust levels in the air had been ordered, and the ventilator program was set to continue until August 1981, when that equipment would be installed. The ALJ discussed at length TNS's ventilator use, noting likely violations of TDRH ventilator policies and the discomfort experienced by employees forced to wear them. *See TNS*, 309 N.L.R.B. at 1410-12 (the ALJ decision is reprinted in the Board's first *TNS* decision, beginning at 1388). However, the use of ventilators is better read as a response to potentially dangerous conditions rather than a dangerous condition itself; in this way, TNS's ventilator policy is either unrelated to, or an amelioration of, a potentially dangerous condition facing the employees.

Therefore, both airborne dust levels and ventilator use are only tangential to the real focus of the Board's inquiry—objective evidence of danger to the employees' health. The third factor underlying the ALJ and Board decisions, the contention that average whole body uranium exposures at TNS were greater than typical for the nuclear industry, speaks directly to employee health concerns. The Board summarized the basis for this factor in its first *TNS* decision. The Board explained that the TDRH called in the National Institute of Occupational Safety and Health (NIOSH) to investigate the TNS facility in late 1981, and quoted from the resultant NIOSH report in noting:

> NIOSH found that "whole body doses for production workers from 1975 to 1980 ranged from 1.06 rems to 2.16 rems," with none having "ever exceeded 5 rems per

> year whole body dose" since 1978. NIOSH concluded that these doses, "while for the most part within legal limits, were higher than doses observed among workers in other parts of the uranium fuel cycle and other U.S. nuclear industries."

Id. at 1354. The TDRH had adopted NRC regulations stating that external exposure to radiation was not to exceed 5 rems per year. Therefore, according to the Board's reading of the facts, TNS's workers—while apparently receiving higher than average exposure for United States nuclear industries - did not receive radiation exposure above that permitted by NRC/TDRH regulations.[3]

Finally, the Board mentioned the uranium-in-urine levels of TNS's employees. Since the DU used in the manufacturing process at TNS's facility is both a low-level radioactive material and a toxic heavy metal, the TDRH monitored safety levels at the plant with respect to exposure to radiation and intake of uranium. There was no NRC regulation on permissible uranium levels in employees' kidneys; there was only a non-binding guideline, the usefulness of which the parties dispute. The NRC guideline stated that workers face a "possibility of kidney damage" if any single urine sample shows greater than 130 micrograms of uranium per liter of urine (ug/1). *See* NRC Reg. Guide 8.22 (1987). The guideline set a "notice" level of 15 ug/1 and an "action" level of 30 ug/1. The "notice" level is essentially an alarm signal, at

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[3] In so concluding, the Board focused on average whole body uranium levels. However, the NIOSH report recognized that individual exposure levels were a more accurate consideration. A review of the NIOSH report upon which the Board based its factual conclusions reveals that one TNS worker in 1977 and two workers in 1978 had whole body exposures equal to or greater than 5 rems. However, according to the report, no TNS worker was exposed to 5 rems or more after 1978. Therefore, according to the NIOSH report, TNS was in complete regulatory compliance in this regard.

which the cause of the elevated sample should be investigated; when the "action" level is reached, the employee is to be removed from his or her work area until their uranium-in-urine level falls.

However, the guideline had never been adopted by the NRC, and the TDRH used the more permissive standard published by the United States Army for testing uranium levels in employees' kidneys (the DARCOM standard). The DARCOM manual set a "notice" level of 50 ug/1 and an "action" level of 100 ug/1. Again, there was a great deal of discussion in the record in this case about varying results at varying times; however, both parties and the Board agree with the conclusion of the NIOSH report that from 1977-1981, 52% of TNS employees had one or more urine samples greater than the DARCOM notice level of 50 ug/1 and 19.5% had one or more samples above the action level of 100 ug/1. The NIOSH report did not set forth statistics illustrating whether any employees had uranium-in-urine concentrations at or above the danger level of 130 ug/1 set by the NRC guideline. However, the report summarily stated that "urine uranium concentrations exceeded NRC guidelines for bioassay at uranium mills, but not the less stringent [DARCOM] standards enforced by the state." So, just as with the whole body exposure data, the uranium-in-urine data relied upon by the Board as providing objective evidence to support the employees' belief that their workplace was abnormally dangerous consisted of scientific measurements within the limits set by the relevant nuclear regulatory agency.

These facts are important not because they show TNS complying with regulatory rules, but because the limits as set by the NRC and adopted by the TDRH are established with a considerable margin for safety, such that when complied with, no injury would be expected in the exposed workforce. *See Johnston v. United States*, 597 F. Supp. 374, 424-25 (D. Kan. 1984). As the NRC itself has explained, its dose limits

incorporate a "significant safety factor" so that substantial injury or damage should not occur unless exposure exceeds those limits by a "significant multiple." 10 C.F.R. § 140.81(b)(1) (2002). Indeed, even the ALJ recognized the value of reference to the limits set out by the regulatory agencies. She wrote, "I can conceive of no more objective means to assess whether the TNS employees were subjected to abnormal dangers than to examine the evidence in this case in light of the administrative standards." *TNS*, 309 N.L.R.B. at 1437. While the urine samples pointed to by the Board exceed the non-binding guideline set out by the NRC, they are within the standard promulgated by the U.S. Army and adopted by the TDRH, and there is no evidence in the record to suggest that the Army guidelines are not equally good measures of safety.

So, in other words, the pieces of evidence relied upon by the Board as providing objective evidence to support the TNS employees' belief that their workplace was abnormally dangerous merely show that TNS had largely complied with regulatory limits set with a considerable margin for safety.

As we explained above, a lack of emergency action by the NRC or its state counterpart does not prohibit, as a matter of law, an NLRB finding that objective evidence existed to support the employees' belief that their workplace was too dangerous to work in. However, at the same time, the existence of regulatory oversight, the power of the regulator to take emergency remedial action, and the decision not to do so must count for something. In the same way, concrete health measurements within the limits promulgated or adopted by those agencies also must count. The NLRB is not free to discount these facts completely and find evidence of abnormal danger in the face of them without further support. For instance, there could be egregious evidence simply not addressed or understood by the regulator, or the regulator could have been moving too slowly for the circumstances, or

it could be that the regulator was not fully apprised of or in control of the situation. Non-action by the relevant regulator is certainly not *ipso facto* proof of a lack of abnormal danger, but it must weigh against a finding that the employees' belief that their workplace was too dangerous to work in was supported by objective proof.

As mentioned above, the Supreme Court has instructed that when reviewing fact-finding by the Board, courts are to determine whether the findings of fact are supported by substantial evidence by taking into account the evidence upon which the Board relies and "contradictory evidence or evidence from which conflicting inferences could be drawn." *Universal Camera*, 340 U.S. at 487. In the present case, three of the four pieces of evidence relied upon by the Board are not terribly persuasive, and one piece of evidence (the respirator use) is either irrelevant to the danger inquiry or evidence of improved conditions. When we also take into account the NRC and TDRH standards and those agencies' lack of decisive regulatory action as evidence contradicting that evidence, it becomes clear that the Board's conclusion - that objective evidence supported the employees' belief that their workplace had become too dangerous to work in - is simply not supported by substantial evidence on the record considered as a whole.

Inexcusable Delay

Since courts are to be deferential in reviewing agency determinations, denying enforcement of an order solely on the basis of delay is inappropriate. *See, e.g., NLRB v. Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers, Local 480*, 466 U.S. 720, 725, 80 L. Ed. 2d 715, 104 S. Ct. 2081 (1984) (*per curiam*); *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265-66, 24 L. Ed. 2d 405, 90 S. Ct. 417 (1969). This is because, in situations where the questioned award would be payment or action in favor of the company's employees, "the Board is not required to place the consequences

of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers." *J.H. Rutter-Rex Mfg. Co.*, 396 U.S. at 265.

Still, the Administrative Procedures Act holds, "with due regard for the convenience and necessity of the parties or their representatives and *within a reasonable time*, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. § 555(b) (2002) (emphasis added). Accordingly, courts sometimes refuse to enforce agency awards when undue delay has made their enforcement inequitable. *See, e.g. Emhart Indus. v. NLRB*, 907 F.2d 372, 378-80 (2d Cir. 1990) (refusing enforcement after six-year delay).

This circuit has followed a rule under which it will enforce Board decisions, even if delayed, when there is "'no allegation that the delay has in any way prejudiced [the Company], or given the Board, or union, an unfair advantage.'" *NLRB v. Hub Plastics*, 52 F.3d 608, 614 (6th Cir. 1995) (quoting *NLRB v. Mich. Rubber Prods., Inc.*, 738 F.2d 111, 113 (6th Cir. 1984)); *see also NLRB v. Taylor Mach. Prods.*, 136 F.3d 507, 513-14 (6th *Cir.* 1998) (same). In the present case, TNS submits that it would be prejudiced by the Board's decision, in that the decision orders back pay and reinstatement. Since this case dragged on for 18 years between filing and the Board's second decision, the back pay that the Board ordered has potentially been mounting since then. Further, the Company alleges that its operations have so changed that ordering reinstatement of workers would be unrealistic.

In a case with a Board-ordered remedy similar to this one, the Second Circuit modified the Board's award of back pay and reinstatement because the case had dragged on for six years, during which time the back pay figure had mounted and the company had changed its internal structure to the extent that reinstatement was unrealistic. *See Olivetti Office U.S.A., Inc. v. NLRB*, 926 F.2d 181, 189-90 (2d Cir. 1991).

The Board contends that there was no inexcusable delay, in that the case presented novel issues, produced a voluminous record and resulted in a lengthy 161-page decision by the ALJ, two comprehensive Board decisions, and a court of appeals remand, as well as time spent by the Board trying to reach a settlement between the parties. This is all true. However, the undisputed fact is that the case was filed with the Board in 1982. The Board's ALJ did not issue a decision until 1987. The Board did not issue its decision affirming the ALJ until 1992, more than five years later. After remand by the District of Columbia Circuit in 1995, the Board did not issue its second decision until September 1999, more than four years later. This court does not see a reasonable way to hold the Company responsible for damages accruing over all of this time, especially when its structure and business changed in the interim. Accordingly, we VACATE the Board's decision finding TNS to have breached its obligations under § 502, rather than remanding it for further consideration.

APPENDIX B

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD
TNS, INC.

329 N.L.R.B. 602

TNS, INC. AND OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO.

Cases 10-CA-17709 and
10-CA-18785

September 30, 1999

SECOND SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

The principal issue in this case, on remand from the United States Court of Appeals for the District of Columbia Circuit,[1] is whether the Respondent violated Section 8(a)(3) and (1) of the Act by permanently replacing, and thereafter refusing to reinstate, employees who engaged in a work stoppage which the General Counsel asserts was in response to "abnormally dangerous" working conditions involving exposure to radioactive and toxic substances in the Respondent's plant. A

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[1] *TNS, Inc. v. Oil Workers*, 46 F.3d 82 (1995). The Board's prior decision is reported at 309 NLRB 1348 (1992). Subsequent to the court's remand, the Respondent and the Charging Party Union filed statements of position. The Labor Policy Association and the Chamber of Commerce of the United States of America filed a statement of position as *amici curiae*. The Respondent filed a reply brief to the Union's statement of position and the Union filed a reply to the *amici* statements of position.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

corollary issue is whether the Respondent violated Section 8(a)(5) by withdrawing recognition from the Union on the basis of a decertification petition signed by a majority of the replacement work force.

The General Counsel and the Charging Party argue that Section 502 of the National Labor Relations Act[2] protects the employees from permanent replacement because their work stoppage was a "quitting of work . . . in good-faith because of abnormally dangerous conditions" and therefore, does not constitute an economic strike. The Respondent contends that the employees were never exposed to abnormal health risks and were economic strikers. Thus, it was entitled to hire permanent replacements, which in turn provided a legitimate business justification for its refusal to reinstate the employees. The judge agreed with the General Counsel and Charging Party, found that the Respondent had violated Section 8(a)(5), (3), and (1), and ordered the Respondent, among other things, to reinstate the employees and bargain with the Union. The Respondent excepted to the judge's findings and analysis.

In the subsequent Board Decision and Order, a two-member plurality of a four-member Board reversed the judge and dismissed the complaint, in pertinent part, on the grounds

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[2] 29 U.S.C. 143. Sec. 502 states:

SAVING PROVISION

Sec. 502. Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such service, without his consent; nor shall the quitting of labor by an employee or employees in good-faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act.

that the General Counsel had failed to prove that, at the time of the walkout, "the totality of available evidence supplied a sufficient basis for a reasonable good-faith belief that the employees' working conditions were 'abnormally dangerous' within the meaning of 502."[3] In so finding, the plurality articulated and applied a test requiring the General Counsel to prove that employees exposed to radioactive and/or toxic substances, reasonably believed, on the basis of objective evidence, either (1) that inherently dangerous conditions in the subject workplace had changed significantly for the worse, so as to impose a substantial threat of imminent danger if exposure were continued at the time the employees began to withhold their services, or (2) that the cumulative effects of exposure to those substances had reached the point at which any further exposure would pose an unacceptable risk of future injury to employees. [309 NLRB 1357-1358.]

A third Board member concurred with the plurality's dismissal of the complaint allegations, but he relied on a different test. In his view, a work stoppage was covered by Section 502 only if it was the "sole cause" of a walkout. In this case, he found that the work stoppage was motivated at least in part by the employees' desire to obtain favorable terms in a new collective-bargaining agreement.

The dissenting fourth Board member maintained that the judge had correctly determined that Section 502 applied to slow-acting, cumulative health risks, that the General Counsel had demonstrated that the employees' walkout was in good-faith and based on objective evidence of cumulative overexposure to radioactive and toxic chemicals which rendered the TNS plant an abnormally dangerous, presently

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[3] 309 NLRB at 1355. The plurality therefore found it unnecessary to decide whether an employer could lawfully hire permanent replacements for employees engaged in a Sec. 502 work stoppage.

existing threat to their safety, and that employees who quit work because of abnormal dangers under Section 502 cannot be permanently replaced.

In remanding the case, the court specifically rejected the sole-cause test for Section 502 set forth in the concurring opinion. It was then left with only the plurality's interpretation of that section, which is supported by less than a Board majority. As a result, we are unable to discern the policy of the Board in a case in which the entire Board purported to address the underlying issue. We therefore hold that the [Board's] . . . decision is thus not properly reviewable in this court.[4]

The court remanded the case to the Board for reconsideration, with instructions to "articulate a majority-supported statement of the rule that [it] will be applying now and in the future . . . in determining the applicability of section 502 in the context of occupational exposure to low-level radiation."[5]

The Board has accepted the court's remand.[6] In accordance with the court's instructions, and for the reasons set forth here, we adopt the following test to be applied in this and future cases involving cumulative, slow-acting dangers to employee health and safety. In order to establish that a work stoppage is protected under Section 502, the General Counsel must demonstrate by a preponderance of the evidence that the

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[4] 46 F.3d at 85 (emphasis in original).

[5] *Id.* at 92 (citation omitted). The court made it clear, however, that in declining to defer to the plurality view and remanding the case to the Board, it was deferring to the Board's judgment and Congressionally-mandated "principal policymaking authority."

[6] The Respondent has filed a motion to disqualify and recuse former Chairman Gould from consideration of this case. The motion has become moot as a result of the expiration of the former Chairman's term as a Board member on August 27, 1998.

employees believed in good-faith that their working conditions were abnormally dangerous; that their belief was a contributing cause of the work stoppage; that the employees' belief is supported by ascertainable, objective evidence; and that the perceived danger posed an immediate threat of harm to employee health or safety.[7] Applying this test, we find, as explained below, that the General Counsel met the burden of proving that the Respondent's employees engaged in a Section 502 work stoppage. Further, we hold that employees who quit work under circumstances governed by Section 502 are not economic strikers and are not subject to permanent replacement. We therefore conclude that the Respondent violated Section 8(a)(3) and (1) by failing to reinstate the employees when they offered to return to work and violated Section 8(a)(5) by withdrawing recognition from the Union and refusing to bargain with it.

As the court noted, this case involves the definition of a legal right under the Act. Further, the facts of the case render it one of first impression before the Board. As we will discuss below, however, we do not view the Act's language, judicial interpretation of it, or underlying principles of labor law as requiring the enunciation of a novel "rule" involving exposure to slow-acting radiation and toxins as distinct from other, more obviously immediate dangers to employee health or safety. The Board has found Section 502 applicable in a number of factual settings, some of which will be discussed below, but it has never faced the issue of how the provision

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[7] We have considered the two-prong test set forth by the plurality in the Board's previous decision. We reject that test because it places an unreasonably heavy burden on employees to substantiate their good-faith belief that working conditions are abnormally dangerous. We also reject the position of the *amici* that Sec. 502 applies only when the General Counsel has proved that working conditions were in fact abnormally dangerous. As noted by the judge, the *D.C. Circuit in Banyard v. NLRB*, 505 F.2d 342 (1974), has held that Sec. 502 does not require proof of abnormal danger-in-fact.

applies to dangers that are not sudden, readily apparent, or self-limited in time-in other words, to insidious dangers involving a latency period before the harm manifests itself. This latency period is the factual variable that makes this case one of first impression. Pursuant to the court's remand, our task is to define the type of evidence that will prove a good-faith belief of the existence of "abnormally dangerous conditions for work" in such circumstances.

Thus, our order of business is to examine the facts as fully developed by the judge and to evaluate her analysis; to state our own formulation of the circumstances under which the Board will find a work stoppage protected by Section 502 and the standards we will apply; to relate these standards to the facts of this case; and finally, to state our policy respecting the relationship between Section 502 and the permanent replacement of economic strikers.

A. Factual Background

The facts of this case are more fully developed in the preceding judge's, Board, and court decisions. We summarize them below. During the relevant period of 1980-1981, the Respondent manufactured nonnuclear ammunition made from depleted uranium (DU) in a facility in Tennessee. The Union represented about 100 employees in a production and maintenance bargaining unit. The relevant collective-bargaining agreement between the Respondent and the Union terminated on April 30, 1981.[8]

The manufacturing process at TNS involved the release into the air of DU dust. When ingested or inhaled, this substance presents two potentially life-threatening hazards to humans. It is a low-level radioactive carcinogen. It is also a toxic heavy metal that poses a threat to the kidneys.

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[8] Unless otherwise noted, all further dates shall be in 1981.

Because DU is mildly radioactive, the Respondent's plant was under the jurisdiction of the United States Nuclear Regulatory Commission (NRC), which, pursuant to an agreement with the State of Tennessee, delegated its oversight of the Respondent's operations to the Tennessee Division of Radiological Health (TDRH). Among TDRH's duties were licensing Tennessee nuclear facilities and devising and enforcing regulations to protect workers and the public from the hazards of the nuclear industry. The NRC/TDRH agreement provided that NRC could terminate or suspend TDRH's authority if necessary to protect public health and safety, or if the state failed to comply with requirements of the Atomic Energy Act.[9] On occasion, NRC officials accompanied TDRH employees on their inspections of the Respondent's plants. In furtherance of its mandate, TDRH periodically inspected nuclear facilities to insure compliance with its safety standards. TDRH had the legal authority to close a facility through suspension or revocation of the facility's license to operate a nuclear plant in the state.

To protect against potential injury or illness from exposure to DU, TDRH adopted the official dose limits set by the NRC for both external and internal exposure. Employees' external exposure (also referred to as "whole body" exposure) was not to exceed 5 rems[10] per year or 1.25 rems per calendar quarter. Internal exposure, measured by "in vivo" lung scans, was not to exceed 15 rems per year. With respect to the allowable amount of DU in the kidneys, the NRC maintained only published "guidelines" but had no official limits. The guidelines (reg. guide 8.22) stated that kidney damage may occur if an employee had a single urine sample with more than 130 micrograms of uranium per liter of urine (ug/l), or 4 or more samples with levels exceeding 30 ug/l. The proposed

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[9] 42 U.S.C. Sec. 202(j)(1).

[10] A "rem" is a measurement of radioactive exposure.

"notice" level was 15 ug/l and the "action" level was 30 ug/l.[11] Rather than these guidelines, however, the Respondent followed TDRH-approved standards set by the U.S. Army ("DARCOM"), which had notice and action levels of 50 and 100 ug/l respectively. In addition, TDRH required facilities under its jurisdiction to subscribe to the ALARA principle, which required that they keep all exposures to DU "as low as is reasonably achievable."[12]

To comply with TDRH regulations, the Respondent used a contaminant control system to reduce DU dust in the plant's atmosphere. Because radiation inevitably escapes into the work area, TDRH had established standards for the "maximum permissible concentration" (MPC) of airborne DU particles, beyond which no worker is to be exposed for 40 hours a week for 13 weeks. TDRH required licensees to keep airborne DU dust to a maximum of 25 percent of MPC. If an employer was unable to reduce emissions to the 25 percent level, TDRH authorized the use of respirators, provided that their use conformed with TDRH regulations.

TDRH used NRC Regulatory Guide 8.15 as a standard for respirator use. These regulations required a written statement of policy; use of respirators yielding a certain level of protection; medical approvals and fittings for all employees using respirators; established procedures for choosing, supervising, and training employees who will use them; proper facilities and procedures for cleaning, maintaining,

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[11] *See TNS, Inc.*, 309 NLRB 1348, 1349 fn. 9 (1992) for the definition of action and notice levels.

[12] ALARA is a cost-benefit analysis defined in federal regulations as maintaining levels "as low as is reasonably achievable taking into account the state of technology, and the economics of improvements in relation to benefits to the public health and safety, and other societal and socioeconomic considerations, and in relation to the utilization of atomic energy in the public interest." 10 CFR Sec. 20.1(c).

and storing respirators, and notice to employees that they can leave their work stations if their respirators malfunction or are uncomfortable.

Some aspects of the Respondent's respirator program were admittedly in violation of TDRH regulations, as detailed in the judge's findings. In March, some employees staged a brief wildcat strike in protest of the respirator program, but the Union persuaded them to return to work.

In the fall of 1979, TDRH began to make regular, semi-annual inspections of the Respondent's facility, which revealed that the Respondent was failing to comply with TDRH regulations in certain respects. Between September 1979, and the employees' walkout on May 1, 1981, TDRH conducted eight inspections of varying detail at TNS. Each inspection disclosed deficiencies in the Respondent's commitment to the ALARA concept and to employee safety in general, as well as specific instances in which the Respondent was failing to meet the minimum standard set for exposure to DU.[13] In October or November 1980, some employees pressed the Union for a strike to protest health and safety conditions, but the Union cautioned against it in the belief that because the contract contained a no-strike clause, a walkout might jeopardize the employees' jobs.

Meanwhile, TDRH instructed the Respondent's management to correct the deficiencies uncovered during the inspections. In January, after a finding of airborne DU concentrations above MPC levels, the Respondent instituted compulsory, full-time respirator use for employees in certain areas of the plant. The Respondent planned to continue the respirator program until August, at which time new air filtering equipment as well as shielding devices to minimize airborne DU particles were to be installed.

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[13] The Board's previous decision sets out in fuller detail a description of these inspections. See 309 NLRB at 1350-1351.

In March, the parties commenced negotiations for a contract to succeed the current one set to expire on April 30.[14] On March 10, the Union notified the Respondent that unit employees would stop work after the contract expired at midnight on April 30, and would stay out until the Respondent corrected the safety violations discovered by past TDRH inspections and any new violations uncovered during its upcoming April inspection. On May 1, unit employees began a work stoppage and the Respondent discontinued operations.

The Respondent's facility underwent further inspections following the walkout. In May, the Respondent hired radiation management consultants (RMC), a private consulting firm, to survey its plant. RMC reported that the Respondent was deficient in "six areas of noncompliance": limiting concentrations of airborne materials to restricted areas; respiratory protection; surveys of emissions; release of effluents to unrestricted areas; personnel monitoring; and training and calibration. The report also stated that

> [T]here seems to be a lack of management commitment to a radiation safety program . . . . We observed many areas of noncompliance. These coupled with the past history of whole body and extremity overexposure should be of great concern to management. The plant health physics staff . . . is working to improve the program. However, plant management has to support these changes and has to pay strict attention to the program.

TDRH and NRC conducted investigations of the plant in mid-October and December, which resulted in citations for several violations, including air contamination above MPC in the foundry during the first and last quarters of 1981, and the

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[14] The history of these negotiations is set forth at 309 NLRB 1351-1352.

failure to notify employees of exposure to excessive levels of airborne radioactivity. The investigative report concluded that "it appears that your safety program was inadequate to protect workers from unnecessary radiation." In addition, the National Institute of Occupational Safety and Health (NIOSH) inspected the facilities in November and December, at TDRH's request. NIOSH examined employees' exposure readings and found that external whole body exposure levels, while "for the most part within legal limits" of 5 rems per year, were higher than doses sustained by workers in other facilities in U.S. nuclear industries. From in-vivo testing data, NIOSH further determined that between 1978-1981 32 percent of the employees had exposure levels that, while below the maximum annual dose of 15 rems per year, reflected an "inadequate margin of safety." Finally, NIOSH concluded from its review of urine bioassays that 52 percent of the employees had one or more urine samples greater than the DARCOM notice level of 50 ug/l and 19.5 percent had one or more samples above the action level of 100 ug/l.[15]

In February 1982, the Union unconditionally offered on behalf of all employees to return to work. The Respondent, which had partially resumed operations in August, declined the offer because all positions were held by permanent replacements. After receiving a decertification petition on

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[15] Thus, NIOSH concluded that uranium in urine was above NRC guidelines, but not those set by DARCOM. The NIOSH report stated that:

> Because the NRC guidelines are set to protect workers from the toxic effect of uranium to the kidneys, we may infer that there is some possibility of renal damage among TNS workers who had urine uranium concentrations exceeding this level . . . . Since the majority of TNS workers had very short durations of employment it is unlikely that they have measurably altered changes in renal function. We have therefore concluded that a medical study of renal function in this population would not be useful.

May 3, 1982, signed by a majority of employees then working at the plant, the Respondent withdrew recognition from the Union and has since refused to bargain.

B. Discussion

1. Abnormally dangerous conditions in the TNS plant

The threshold issue in this case is whether the work stoppage was protected by Section 502 of the Act. As previously stated, the judge found that the TNS employees quit work in the good-faith belief, based on objective evidence, that conditions at the plant were abnormally dangerous within the meaning of Section 502. She interpreted precedent as placing on the General Counsel the burden of showing that the employees' perceptions were reasonably based on verifiable grounds; rejected a test placing on the General Counsel the burden of demonstrating danger in fact; found that the General Counsel could cite an employer's failure to correct or abate the danger as evidence of abnormally dangerous conditions; and found that, although the standards and judgments of regulatory agencies and other expert opinions are relevant to whether there is an objective basis for the belief that abnormally dangerous conditions exist, the General Counsel does not have the burden of showing consistent violations of such standards to establish a prima facie case.

We agree with the judge that Section 502 is applicable to abnormally dangerous threats to employee health and safety caused by cumulative exposure to radioactive and toxic substances, even where, as here, there may be no immediate, quantifiable physical injury. We further agree that the factors on which the judge relied in finding that the walkout at TNS was protected by Section 502 are relevant and sufficient for a finding of abnormally dangerous conditions; and that her formulation of the General Counsel's burden of proof was legally correct.

We see no reason to limit the protection of Section 502 because of the peculiar risks inherent in working with radioactive or cumulatively toxic substances, despite the length of time it may take for injury to employees to become evident, provided that the General Counsel can demonstrate that Section 502 applies at the time of their walkout. Although no legislative history exists to facilitate interpretation of Section 502, its broad and absolute language excepting certain types of work stoppages from the definition of a strike gives no indication that Congress intended the provision to cover only certain types of abnormally dangerous threats to employee safety or that it would apply only in certain circumstances. Thus, as the court noted in remanding the case, the Board's responsibility, guided by the general policies underlying the labor laws and by the Supreme Court's interpretation of the statute, is to give the provision concrete meaning and scope in terms of the realities of the workplace.

With those principles as our starting point, we look first to the Supreme Court's only discussion of Section 502 in its Gateway Coal decision.[16] In that case the Supreme Court held that a union must arbitrate a dispute over the employer's continued employment of foremen who had been criminally negligent in monitoring safety conditions. The Court further held that Section 502, in the circumstances of that case, did not prohibit the issuance of an injunction to enforce a contractual no-strike clause,[17] because the district court below had conditioned the injunction on the suspension of the foremen, thus mooting the safety issue. In the context of determining Section 502's effect on a no-strike clause, the Court interpreted it as "[providing] a limited exception to an

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[16] *Gateway Coal v. Mine Workers*, 414 U.S. 368 (1974).

[17] *See Boys Market, Inc. v. Retail Clerks*, Local 770, 398 U.S. 235 (1970).

express or implied no-strike obligation. . . . [A] work stoppage called solely to protect employees from immediate danger is authorized by [Section] 502 and cannot be the basis for either a damages award or a *Boys Markets* injunction." *Gateway Coal*, 414 U.S. at 385. The Court found Section 502 inapplicable to the facts in *Gateway Coal* because the "claim concerns not some identifiable, presently existing threat . . . but rather a generalized doubt in the competence and integrity of company supervisors." *Id.* at 386. The Court expressly did not pass on whether the presence of the foremen would have been sufficient to block the injunction, noting that the action of the lower court had removed any immediate danger and mooted the issue.

In *Gateway Coal*, the Court quoted with approval the dissent's analysis in the underlying circuit court case. The majority in the Third Circuit Court of Appeals had denied injunctive relief to the employer, in part on the basis that Section 502 applied, concluding that "an honest belief, no matter how unjustified, in the existence of 'abnormally dangerous conditions for work' necessarily invokes the protection of Section 502."[18] The Court agreed with the dissenting judge that a union seeking Section 502 justification for an unprotected work stoppage "must present 'ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists.'"[19]

Although the actual Section 502 issue became moot in *Gateway Coal*, the case and the Court's comments on Section 502 are significant and have been consistently useful to the Board in applying the provision to various factual scenarios. The test that we today announce for work stoppages protesting exposure to radioactive or toxic substances is

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[18] *See Gateway*, *supra* at 386-387.

[19] *Id.* at 387 (citation omitted).

derived in large part from the language of *Gateway Coal*, and its progeny. To repeat, we hold that in order to establish that a work stoppage is protected under Section 502,

> [T]he General Counsel must demonstrate by a preponderance of the evidence that the employees believed in good-faith that their working conditions were abnormally dangerous; that their belief was a contributing cause of the work stoppage; that the employees' belief is supported by ascertainable, objective evidence; and that the perceived danger posed an immediate threat of harm to employee health or safety.

Under the test we have announced today, it is only necessary that the abnormally dangerous conditions be a contributing cause of the employee work stoppage. The court's opinion in this case fully explains why it is legally unreasonable to require proof that the safety issue be the sole cause of a work stoppage. 46 F.3d at 91-92. The same reasoning applies to and warrants rejection of the dissent's view that Section 502 should apply "only where the abnormally dangerous conditions are the proximate cause of the work stoppage, i.e., but for the abnormally dangerous conditions, the employees would not have stopped work." We find that the dissent's proximate cause test is as "hopelessly shortsighted" as the sole-cause test that the court harshly criticized. It is particularly so in cases where abnormally dangerous conditions result from cumulative exposure to slow-acting conditions in the workplace where there is no one exact moment at which employees can determine that those conditions would justify a work stoppage within the meaning of Section 502. If they simultaneously had a dispute with their employer over bargaining demands, they would rarely, if ever, be able to walk out in protest over abnormally dangerous conditions without risking a finding that their walkout would not have occurred "but for" the coincidental existence of the economic dispute. As a result, under either

the sole cause or proximate cause test, employees would have to foreswear their statutory right to strike in support of bargaining demands in order to secure their statutory right to escape abnormally dangerous conditions in the workplace. As the court stated, "[e]mployees cannot be made to promise to return to work from a lawful economic strike in order to prove the legitimacy of their concern over the unsafe conditions." *Id.* at 92.

Contrary to the dissent, we do not find that our test makes it easy for a union and employees to insulate economic protests from Section 8(d), contractual no-strike provisions, or the risk of permanent replacement. Abnormally dangerous conditions, as defined by the Board and courts, are, as stated, abnormal and not readily available to confer what the dissent calls "super-protection" when striking for economic gains. In those few instances where the quitting of work because of abnormally dangerous conditions may coincide with economic objectives, the Congressional concern for employee safety manifest in Section 502 should not be diminished by the coincidence of these other causes for a work stoppage. As the court has stated in this case, that "employees also desired better wages is irrelevant." *Id.* at 91. *Cf. Teamsters Local 515 v. NLRB*, 906 F.2d 719, 723 (D.C. Cir. 1990) (in an unfair labor practice strike, "[t]he employer's unfair labor practice need not be the sole or even the major cause or aggravating factor of the strike; it need only be a contributing factor"). The dissent misconstrues the basis for our reference to the causation test for unfair labor practice strikes. The common thread between that test and the causation test for a Section 502 work stoppage is the statutory protection of employee rights; i.e., the right to be free from unfair labor practices and the right to quit work when faced with the risk of serious illness or injury. In both instances, it is within the employer's control to eliminate the noneconomic causes of a work stoppage, either by remedying the unfair labor practices or

abating the abnormally dangerous conditions. Any work stoppage continuing after such employer action would ordinarily revert to the status of an economic strike.

That the test we announce today closely tracks the language of Section 502 should be readily apparent. Perhaps the most difficult task in applying Section 502 to health and safety risks such as those that existed at TNS is determining the type of ascertainable objective evidence that will be sufficient to support employees' good-faith belief that the perceived dangers at their workplace pose an immediate threat of harm to their health and safety.

In *Fruin-Colnon Construction Co.*,[20] the Board adopted the administrative law judge's definition of "abnormal" as "deviating from the normal condition or from the norm or average." We adhere to that settled and reasonable standard. In the past, the Board has found abnormal danger in cases in which risks that are ordinarily present have been intensified. Examples include a natural seepage of water that became a steady flow causing interference with footing at the base of a mine shaft, coupled with an unusually forceful updraft of dust and dirt which made it difficult for miners to keep their eyes open;[21] an improperly operating exhaust blower which caused the temperature in the workplace to rise to 110 degrees Fahrenheit with "dust, lint, dirt, and abrasives . . . flying all over the room, making it difficult for the [men] to breathe,"[22] operation of equipment that was either inappropriate or appeared to be dangerously impaired, i.e., unloading cargo

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[20] 139 NLRB 894 (1962), *enf. denied on other grounds* 330 F.2d 885 (8th Cir. 1964).

[21] *Id.* at 898.

[22] *Knight Morley Corp.*, 116 NLRB 140, 142 (1956), *enfd.* 251 F.2d 753 (6th Cir. 1957), *cert. denied* 357 U.S. 927 (1958).

from pallets rather than customary slings;[23] working in a railyard with ineffectual stops for moving freight cars and inadequately functioning respirators;[24] and driving a truck when the transmission appeared unsafe.[25] Generally, the Board has found abnormally dangerous conditions in working environments that already contained some risks, such as the coal shaft in *Fruin-Colnon* and the dock in Philadelphia Marine where employees were routinely called on to unload heavy, unwieldy cargo. However, the Board has also found that abnormally dangerous conditions did not exist in facilities in which the work carried inherent dangers. *See, e.g., Beker Industries Corp.*,[26] where the effects of a chemical explosion had dissipated several hours before the employee was to begin work at a neighboring plant; Mine Workers, District 6,[27] where a supervisor's safety violations, while a genuine cause for concern, did not rise to the level of abnormal danger; and Union Independiente de Empleados de Servicios,[28] where the Board found that a fight between a supervisor and an employee was not serious enough to give rise to an "imminent and dangerous employee safety condition." The variety of the circumstances to be evaluated, even in this small number of cases, demonstrates the wisdom of a case-by-case approach within the guidelines set forth in *Gateway Coal.*

We recognize that some jobs and worksites contain inherent dangers that even the most careful employers may find difficult to eliminate entirely. Such inherent routine

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[23] *Philadelphia Marine Trade Assn.*, 138 NLRB 737 (1962), enfd. 330 F.2d 492 (3d Cir. 1964).

[24] *Richmond Tank Car Co.*, 264 NLRB 174 (1982).

[25] *Roadway Express, Inc.*, 217 NLRB 278 (1975).

[26] 268 NLRB 975, 976-977 (1984).

[27] 217 NLRB 541, 551 (1975).

[28] 249 NLRB 1044 (1980).

dangers, however, do not fall under the aegis of Section 502. It is when such risks escalate to the point, or are maintained at a point, at which they pose a presently existing threat to employee health or safety that Section 502 comes into play. Such was the case in *Philadelphia Marine*: transferring heavy, unwieldy objects from ships to wharves will never be without risk; the additional element, however, of a management decision to substitute an unreliable method of performing the work transformed the "normal" danger into the "abnormal" danger covered by Section 502.[29] In the case at hand, it may be that manufacturing armor-piercing warheads out of depleted uranium cannot be made risk free. However, the facts here, summarized above and presented more fully by the judge, show that the risks the employees faced at TNS went beyond what might or should reasonably be expected in such a plant.

In assessing whether the employees believed in good faith that their conditions of work were abnormally dangerous, our standard will be, as noted above, whether ascertainable, objective evidence exists to support their belief. As in *Gateway Coal*, a purely subjective impression of danger will not suffice; nor will a speculative doubt about safety in general. The General Counsel, however, will not be required to show that injury has already occurred; as the Board stated in *Knight Morley*, the fact that employees were not actually injured or made ill may simply reflect the fact they escaped injury or illness by leaving when they did.[30] Rather, the reference point for assessing Section 502 coverage will be the conditions in a facility as they presented themselves to the employees. When presented with the dangers such as those that existed at TNS, we will decide whether a work stoppage is protected by Section 502 by examining, on a case-by-case

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[29] *See also Fruin-Colnon, supra.*

[30] 116 NLRB 140, 144.

basis, factors that, taken together or separately, would alert employees to safety threats beyond the norm. Such indicators would include, but would not be limited to, whether conditions appeared to be deviating from the norm or from a reasonable level of risk; whether equipment intended to protect employees from exposure to toxic substances appeared to be operating in a manner sufficient to afford such protection; whether employees had received sufficient instruction in the use of safety equipment to render that equipment effective; and whether management policies mandated and supported the proper use of safety equipment and standards for handling dangerous substances; any negative evaluations from regulatory agencies and any failure of the employer to correct serious infractions. In short, we will consider whether employees' observations of their workplace and its practices as they related to exposure to toxic and radioactive substances reasonably led them to conclude that the dangers they faced in the workplace had reached a level beyond those reasonably to be expected in the industry and that their continued exposure to harmful substances subjected them to a risk of future serious illness or injury. We will also consider evidence of significant deviation from industry standards for a workplace safe for employees, expert testimony as to the risks faced by employees, and analyses of the level of exposure employees had reached at the time they walked out.[31]

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[31] We recognize that, as in the present case, some of this evidence may arise after the work stoppage takes place. None of the parties here have objected to the after-the-fact nature of such evidence. In fact, the parties have relied on such evidence in support of their opposing positions. Where such objections are raised, we shall consider them in deciding the relevance and weight to be accorded the evidence under the totality of circumstances presented in that particular case. Such evidence could very well be relevant, as in this case, in confirming that the employees' belief that they were being subjected to abnormally dangerous working conditions was indeed supported by "ascertainable, objective" facts. In

With respect to the issue of whether the employees were facing an "immediate, presently existing danger," we emphasize that the danger must have been presently existing and direct, but we do not interpret the term "immediate" as meaning that the employees had to depart the workplace in one moment or face grave injury in the next. In the case of cumulative exposure to radioactive and toxic substances, there will probably not be a single moment when "immediate" departure from the workplace is obviously necessary. Where the danger is cumulative, the issue will not be whether employees should suddenly leave, but rather whether a presently existing, reasonable possibility of serious incipient or future illness or injury existed. In some instances, when latency periods have run their course, historical analysis may sadly prove that employees waited far too long to cease work in order to protect themselves from such immediate dangers.

In accord with the foregoing standards, we examine in this case the conditions of the Respondent's facility from the perspective of the employees to determine whether they believed in good faith that their working environment had become abnormally dangerous. Although, as the judge noted, employees had little insight into how the radiation and chemically toxic properties of DU affected the body, they did understand that working with the substance presented potential health risks which were best avoided by minimal contact with it. Employees testified, however, that the Respondent's production process involved frequent exposure to DU. "Greensalt," the powdered form of DU prior to its transformation to a metallic state following a pressurized heating or "firing" process, often spilled on them as it was delivered to the plant and unloaded and transported to other

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addition, after-the-fact evidence could be helpful in determining whether the General Counsel has met the burden of showing that the perceived danger posed an immediate threat of harm to employee health or safety.

departments. Left uncleaned, the spilled greensalt was tracked through the plant, including into the employees' locker room resulting in further contact by employees to DU. The "firing" process exposed employees to additional DU in the form of contaminated smoke and vapors that escaped from furnaces and other machinery. Protective equipment enclosures designed to prevent emission of the contamination during the firing stage and subsequent stages of the production process either did not exist or were in disrepair.

There is no dispute that the greensalt spills and the airborne emissions of DU were the source of the hazardous contamination at the Respondent's facility. There is also no dispute that employees considered this hazard as the principal threat to their well being. They made this clear during joint labor-management safety tours conducted each month by repeatedly referring to the spilled greensalt and atmospheric DU dust. Written reports of the tours summarizing these perceived dangers were posted for review by all employees above their timeclock. Further, in union meetings held during the weeks immediately prior to their walkout, the main topic of discussion among employees centered on their fears of continuous exposure to DU-specifically, the Respondent's failure to correct the deficiencies highlighted in the health and safety reports and its imposition of a mandatory respirator program which the employees considered an inadequate measure to protect them from exposures. As one employee put it, "[o]n the last date when they took the final strike vote, we all discussed the unsafe dirty conditions in the plant and decided we needed to do something if we were going to work there. We had to do something to get it cleaned up."

As did the judge, we cannot conclude from the record before us that the employees' stated beliefs regarding their working conditions were not genuine, i.e., held in good-faith. A question remaining to be answered affirmatively to gain

coverage under Section 502 is whether their good-faith belief was supported by objective evidence. The judge found that it was, citing the following four factors:

> (1) air quality at the facility exceeded MPC at 11 work stations for at least the last quarter preceding the strike; (2) the protracted use of respirators by a substantial number of employees was deleterious to their health; (3) the employees' average whole body uranium exposures were far greater than those typical for the nuclear industry; and (4) that repeated and excessive uranium-in-urine levels indicated serious risk of kidney damage . . . . [And] that these conditions came about and were not soon abated because Respondent failed to comply diligently with governmental codes prescribing sound health physics practices.

We find this evidence, confirmed by either scientific testing or regulatory oversight, and some of which was readily observable and thus known to employees in the months leading up to their walkout, constitutes objective proof supporting their belief that their workplace had become too unsafe an environment to continue working. The evidence likewise substantiates the immediacy of the danger presented. When TNS employees ceased work on May 1, 1981, they had already endured a substantial period of sustained exposure to conditions which they reasonably believed were abnormally dangerous. For that reason, we find that there was a presently existing, reasonable possibility of serious incipient or future illness or injury. In agreement with the judge, therefore, we conclude that abnormally dangerous working conditions were a cause of the work stoppage and that the employees were therefore engaged in a work stoppage protected by Section 502.

2. Permanent replacement of employees engaged in a Section 502 work stoppage

We agree with the judge that, under Congress' explicit language and policy, employers are not free to hire permanent replacements for employees who cease work under Section 502. Section 502's broad and positive language establishes a significant policy: employees who engage in Section 502 work stoppages are not strikers; thus, they are not subject to the risk faced by economic strikers that their struck employer will invoke the privilege announced in *NLRB v. Mackay Radio & Telegraph*, 304 U.S. 333 (1938), and permanently replace them. Stated differently, because a Section 502 work stoppage is for the purpose of escaping abnormally dangerous working conditions, it is not an economic weapon in support of bargaining demands, and there can therefore be no basis for Mackay's balancing of employers' economic interests against employees' interests in their own health and safety. As the Sixth Circuit observed in Clark Engineering v. Carpenters,[32] "[w]hen a work stoppage properly results from abnormally dangerous working conditions, an employer cannot resort to the weapons available to him in an economically motivated work stoppage"-including permanent replacement. Effectuating Section 502's policies, as expressed in the provision's language, requires that the Board protect the right of employees, forced to leave their jobs because of abnormally dangerous conditions, to return to work. To rule otherwise could even result in the anomaly of permanent replacements benefiting from improvements in

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[32] 510 F.2d 1075, 1080 (6th Cir. 1975) (citations omitted). Clark Engineering further describes the purpose of Sec. 502: "When an employee is exposed to abnormally dangerous working conditions and quits work in good-faith because of such conditions the Section protects him or her from employer retaliation. The employee cannot be discharged. . . . The employer cannot resort to a lockout." *Id.* at 1079 (citations omitted).

working conditions denied to those who walked out. We view anything less than full protection of the right of employees engaged in a Section 502 work stoppage to return to work as contradicting both Section 502's plain language and the basic principles of the Act at work both at the time Congress passed the provision and today.

Section 502 was part of the 1947 Taft-Hartley amendments to the 1935 National Labor Relations Act. Congress considered and passed these amendments in the context of a widespread reexamination of the strike as an economic weapon. One major element of Congress' purposes in passing Taft-Hartley was to remove certain kinds of strikes, such as secondary boycotts, from the protection of the statute in order to protect the public from interruptions in the flow of commerce. Taft-Hartley's declaration of purpose and policy states in part that it should "promote the legitimate rights of both employees and employers in their relations . . . to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce" (emphasis added). Taft-Hartley also added to the Wagner Act's original "[f]indings and declaration of policy" the observation that

> Experience has . . . demonstrated that certain practices by some labor organizations . . . burden . . . or obstruct . . . commerce . . . through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public. . . . The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.[33]

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[33] 29 U.S.C. §151. Congress had not expressed such a view when the Act was passed in 1935. In the Act's original statement of findings and policies, Congress had, while acknowledging that the purpose of the Act was to promote industrial peace and the free flow of commerce, seen fit to

The amendments define a strike broadly as "any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees."[34]

It is in the context, then, of Congressional sensitivity to the interruptions in commerce caused by certain types of economic actions, that Section 502 excepts from the definition of a strike the "quitting of labor by an employee or employees in good-faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees." It is particularly significant that Congress, in outlawing some forms of economic weaponry that it had come to view as potentially deleterious to the public good, explicitly excepted quitting of work because of abnormally dangerous conditions.

In passing Section 502, Congress knew that, when employees strike over economic issues, they risk permanent replacement. Fifteen years earlier, and only 3 years after Congress had passed the Act, the Supreme Court stated in *Mackay* that, although the Act expressly protects the right to strike, "it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers . . . to create places for them."[35]

In *Mackay*, the Court interpreted the Act as leaving open to employers who have not committed unfair labor practices the

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further those goals only by setting out and protecting the rights of employees to self-organization, collective bargaining, and concerted activity, among other things. No mention was made of the need to limit employee or union access to economic weapons.

[34] 29 U.S.C. §142(2).

[35] 304 U.S. at 344-345.

powerful economic weapon of permanent replacement. *Mackay* thereby balanced the right of employees to strike over economic demands with a corresponding economic privilege of employers to continue business operations during the strike by replacing economic strikers.

Mackay extends a limited privilege only to employers engaged in economic warfare who have not committed unfair labor practices. Early cases involving unfair labor practice strikes make clear that Mackay sets out an exception to the Act's general prohibition on interference with the right to strike and to engage in protected activities involving the cessation of work.[36] After Mackay and before Taft-Hartley, the Board consistently ordered backpay and reinstatement for strikers who had walked out because of their employer's unfair labor practices, and the courts consistently enforced these orders.

Moreover, the Taft-Hartley Congress was well acquainted with the distinction between the strike as economic action as opposed to a reaction to noneconomic causes, i.e., an employer's unfair labor practices. As the Supreme Court noted in *Mastro Plastics Corp. v. NLRB*:[37]

> The record [of Taft-Hartley's legislative history] shows that the supporters of the bill were aware of the established practice which distinguished between the effect on employees of engaging in economic strikes and

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[36] *See*, e.g., *NLRB v. Poultrymens' Service Corp.*, 138 F.2d 204, 210 (3d Cir. 1943) (Strike caused by employer's unfair labor practices; Board authorized to order that strikers be reinstated with backpay); *NLRB v. Carlisle Lumber* Co., 99 F.2d 533 (9th Cir. 1938) (Board can remedy unfair labor practices with backpay and reinstatement; these remedies apply to employees who struck because of unfair labor practices).

[37] *Mastro Plastics Corp. v. NLRB*, 350 US. 270, 288, 289 (1956) (citations omitted).

> that of engaging in unfair labor practice strikes. If Congress had wanted to modify that practice, it could readily have done so by specific provision.

Further, the Court emphasized that, despite Taft-Hartley's removal of statutory protections from certain types of strikes, it did not alter the "affirmative emphasis that is placed by the Act upon freedom of concerted action."[38]

Section 502 must be read in light of Congress' continuing affirmative emphasis on employee concerted action and the distinction between economic action, with its attendant risks, and noneconomic work stoppages. In Mastro Plastics, the Supreme Court reaffirmed this distinction in holding that an employer may not replace employees whose strike is caused by unfair labor practices. Even Section 8(d), which deprives strikers of their status as employees under the Act for violating the waiting period before striking, does not apply if the strike is in response to their employer's serious unfair labor practices. The Court noted that to find otherwise would deprive strikers of statutory protection when their need for representation is greatest and would remove their freedom to strike against unfair labor practices aimed at their representative rights. The Court emphasized the "inherent inequity" that would result from penalizing employees for engaging in "conduct induced solely by the unlawful conduct of the [employer]." 350 U.S. at 287.[39] Thus, under Board and court law, permanent replacement is an economic weapon and can be used as a defense against a strike under one circumstance only: the strike over economic issues.

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[38] *Id.* at 287.

[39] "Unfair labor practice strikers are ordinarily entitled to reinstatement even if the employer has hired permanent replacements," *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379 fn. 5 (1967), explaining *Mastro Plastics*.

We view the Court's analysis in *Mastro Plastics* as a valuable guide to our determination of whether it is appropriate to balance an employer's interest in continuing operations by permanently replacing employees against the right of employees to leave their jobs without economic consequences under Section 502. If, in the Court's view, there would be an "inherent inequity" in permitting an employer to hire permanent replacements for unfair labor practice strikers, even when they strike during a statutorily-mandated waiting period, it would be equally inequitable to permit an employer to hire permanent replacements for employees engaged in a statutorily-sanctioned work stoppage to escape abnormally dangerous working conditions. To permit the hiring of permanent replacements for employees engaged in a Section 502 work stoppage would essentially render meaningless the special protections afforded employees by that statutory provision.

While we do not suggest that TNS committed an unfair labor practice, analogous to *Mastro Plastics*, it is nonetheless solely responsible for the maintenance of working conditions at the plant, and it is those working conditions that the employees reasonably perceived to be abnormally dangerous, driving them to quit work. Correspondingly, the TNS employees are innocent of responsibility for these conditions. Contrast this to the economic strike where both sides bear some responsibility for the situation that leads to the employees' decision to walk out. Where economic warfare results because both parties, despite good-faith bargaining, cannot reach agreement, then, and only then, does the employer have a right to employ the economic weapon of permanent replacement.

In sum, as a matter of statutory interpretation and Congressional policy, we hold that an employer cannot permanently replace employees engaged in a Section 502 work stoppage. The Mackay employer privilege, and its

underlying rationale, apply only to the circumstances of a pure economic dispute. It would be particularly inappropriate to extend it to employers whose employees are forced to leave their workplace because of potentially life-threatening, abnormally dangerous working conditions, such as those which prompted the TNS employee work stoppage.

CONCLUSION

We have found that the work stoppage at TNS was protected by Section 502 and that the Respondent was not entitled to hire permanent replacements for the employees who walked off the job because of conditions that they reasonably believed were abnormally dangerous. Accordingly, we find that the Respondent was without a legitimate business justification when it refused to reinstate the unit employees upon their unconditional offer to return to work and, thereby, violated Section 8(a)(3) and (1). In addition, by withdrawing recognition from and refusing to bargain with the Union based on the contention that the decertification petition signed by the replacement employees evidenced the Union's loss of majority support, the Respondent further violated Section 8(a)(5) and (1).

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(5), (3), and (1) of the Act, we shall order the Respondent to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, with respect to the 8(a)(3) violations, the Respondent shall be ordered to offer full reinstatement to all employees who participated in the Section 502 work stoppage to their former positions or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

The Respondent shall also make these employees whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination practiced against them from February 15, 1982, the date that their unconditional offer to return to work was rejected by the Respondent, until the date that the Respondent makes them a valid offer of employment, less net interim earnings.[40] Backpay shall be computed, with interest, in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Interest on or after January 1, 1987, shall be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Interest on amounts accrued prior to January 1, 1987, shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).[41]

With respect to the Respondent's withdrawal of recognition from, and refusal to bargain with, the Union on or about May 4, 1982, in violation of Section 8(a)(5) and (1), the

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[40] The commencement date of this make-whole remedy is different from the one ordered by the judge. She treated the employees herein as unlawfully discharged unfair labor practice strikers and ordered backpay beginning from the date of discharge in accord with *Abilities & Goodwill*, Inc., 241 NLRB 27 (1979). However, the violation which she found and which we adopt is the permanent replacement of employees. The commencement date of make-whole relief for such a violation is the date on which a respondent refuses an unconditional offer by permanently replaced employees to return to work. *Ancor Concepts, Inc.*, 323 NLRB 742 (1997). That date in this case was February 15, 1982.

[41] The foregoing remedial provisions do not apply to the employees who were working in the penetrator shop on the day of the work stoppage. In its original decision the Board dismissed the complaint allegation that the Respondent violated Sec. 8(a)(3) by failing to reopen and reinstate penetrator shop employees to their positions after the Sec.502 walkout. 309 NLRB 1366-1367. This issue is not before us on remand, nor is the independent Section 8(a)(1) complaint allegation, also dismissed by the Board, regarding the Respondent's statement to employees pertaining to the seniority status of employees returning to work after the walkout. *Id.* at 1367.

Respondent shall be ordered, on request, to bargain in good-faith with the Union and to incorporate in an executed agreement any understanding which may be reached. This is the traditional and appropriate remedy for an unlawful withdrawal of recognition from an incumbent union. *See*, e.g., *NLRB v. Williams Enterprises*, 50 F.3d 1280, 1289 (4th Cir. 1995), enfg. 312 NLRB 937 (1993) ("when a . . . company refuses to recognize or bargain with an incumbent union, only an affirmative bargaining order can restore the status quo ante").

ORDER

The National Labor Relations Board orders that the Respondent, TNS, Inc., Jonesboro, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in the Oil, Chemical and Atomic Workers International Union, AFL-CIO, or in any other labor organization, by threatening to permanently replace and, upon their unconditional offer to return to work, refusing to reinstate its employees who engaged in good-faith in a work stoppage over abnormally dangerous conditions, or by discriminating in any other manner in regard to their hire or tenure of employment or any other term or condition of employment.

(b) Refusing to bargain collectively with respect to rates of pay, wages, hours and terms and conditions of employment with the Union as the exclusive bargaining representative of all hourly paid production and maintenance employees employed by Respondent at its Jonesboro, Tennessee facility, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(c) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer to all employees who participated in the work stoppage which commenced on May 1, 1981, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges and make them whole for any loss of pay they may have suffered as a result of the discrimination practiced against them in the manner set forth in the remedy section of this decision.

(b) On request, bargain collectively with the Union as the exclusive representative of all its employees in the above-described unit with respect to rates of pay, wages, and hours of employment, and other conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(c) Preserve and, within 14 days of a request, make available to the Board and its agents, for examination and copying, all payroll and other records necessary to compute the backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Jonesboro, Tennessee facility, copies of the attached notice marked "Appendix."[42] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by its authorized representative, shall be posted by the Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to

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[42] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 15, 1982.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 30, 1999

Sarah M. Fox, Member

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HURTGEN, dissenting.

Unlike my colleagues, I do not find that the Respondent violated Section 8(a)(3) and (1) of the Act by permanently replacing, and later refusing to reinstate, employees who engaged in a work stoppage allegedly in response to abnormally dangerous conditions. I would therefore dismiss the complaint.

1. Abnormally dangerous conditions were not the proximate cause of the strike Section 502 provides that "the quitting of labor by an employee or employees in good-faith because of abnormally dangerous conditions for work" shall not be deemed a strike. (Emphasis added.) Clearly, there must be a causal nexus between the abnormally dangerous conditions and the "quitting of labor." The Board must decide the appropriate test for determining such causality. As set forth below, I believe that Section 502 applies only where the abnormally dangerous conditions are the proximate cause of the work stoppage, i.e., but for the abnormally dangerous conditions, the employees would not have stopped work. That causality test is not met here. [1]

I disagree with the causation test propounded by my colleagues for determining the applicability of Section 502 of the Act. With respect to causation, my colleagues find it sufficient that "abnormally dangerous working conditions were a contributing cause of the work stoppage." (Emphasis added.) In my view, this sets the causation bar too low. Under the majority test, a work stoppage would enjoy protection under Section 502 even if the abnormally dangerous

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[1] I accept arguendo the validity of my colleagues' definition of "abnormally dangerous conditions." My point is that such a condition, if it existed, was not the proximate cause of the work stoppage.

condition were only a minor or insignificant cause of the work stoppage.

In support of their view, my colleagues rely on a supposed analogy between an unfair labor practice strike and a 502 work stoppage. Thus, inasmuch as a work stoppage can be an unfair labor practice strike if only one of its causes is an unfair labor practice, so too, it is said, a work stoppage falls within the ambit of Section 502 if only one of its causes is an abnormally dangerous condition.

The analogy does not withstand scrutiny. There is an important difference between a Section 502 work stoppage and an unfair labor practice strike. One of the Act's fundamental purposes is to prevent and remedy unfair labor practices. If an employer commits unfair labor practices, and this unlawful conduct is a cause of a strike, it would be inconsistent with a fundamental purpose of the Act for the Board to let the wrongdoer operate with permanent replacements during a strike caused at least in part by his own unlawful conduct. In contrast, the Board has no statutory duty to prevent or remedy abnormally dangerous working conditions. These matters are outside the Board's remedial province. Thus, there is no showing that the conditions in this case were unlawful under the Act or under any other law. Accordingly, there is neither need nor warrant for the Board to transplant the lenient causality test employed in unfair labor practice strike cases to the context of Section 502. My colleagues say that the "common thread" between the "ulp" strike and the Section 502 work stoppage is the statutory protection of employee rights. However, the issue is not whether the strike and work stoppage are protected. Clearly both are protected. The issue is whether there are special protections for Section 502 work stoppages, as there are for "ulp" strikes. The answer is in the negative, for only "ulp" strikes protest unlawful conditions.

In addition, the majority's test would permit needless departure from the sanctity of no-strike clauses. If, during a contract, a dispute arose as to non-safety contractual matters and as to a perceived abnormally dangerous condition, the majority would sanction a work stoppage and its attendant industrial instability. Although arbitration would be available as to the nonsafety contractual matters, and perhaps as to the perceived abnormally dangerous condition, such arbitration would occur in the context of industrial warfare. The very goal that arbitration is supposed to achieve, viz. a peaceful means of resolving disputes, would be undermined.

Similarly, after the expiration of the contract, the work stoppage could occur without the salutary notice, waiting, and mediation provisions of Section 8(d).

My approach would not foster such a relatively easy escape from no-strike clauses and from Section 8(d). At the same time, my approach does not deprive employees of their Section 502 rights. Even in a situation where there are several causes of the work stoppage, the employees will be accorded Section 502 protection if they can show that the abnormally dangerous condition was the proximate cause of the work stoppage.

My colleagues say that their test is simpler to apply than the proximate cause test. But mere simplicity of a rule is not itself a reason for adopting it. We must take into account a panoply of statutory goals, including the sanctity of no-strike clauses and the importance of Section 8(d).

My colleagues also note the difficulty of determining the precise point in time at which employees will reasonably perceive abnormally dangerous conditions. However, that difficulty is inherent in the test that my colleagues themselves have devised for defining that term. They also concede that causation must be shown. The sole difference between my colleagues and me is the test for causation. I am simply

saying that where the work stoppage would have occurred in any event for other reasons it cannot be meaningfully said that the work stoppage is "because of" the abnormally dangerous conditions.

I also disagree with my colleagues' contention that, under my test, employees "would rarely, if ever" be able to engage in a Section 502 work stoppage. If the employees had walked out on March 10, and made it clear that they would return when conditions improved, that would presumably be a Section 502 work stoppage. In this regard, I am not saying that the employees would have "to promise to return to work from a lawful economic strike." Because of the no-strike clause, the work stoppage would not be a lawful economic strike. It would be a lawful 502 work stoppage.

In my view, all of these considerations counsel in favor of a higher causation standard than the one set forth by my colleagues. Accordingly, I would require that the employees' belief be the proximate ("but for") cause of the work stoppage.[2]

The General Counsel has not established such causality. Indeed, the timing of the work stoppage supports the conclusion that there were additional matters which, standing alone, would have caused the work stoppage in any event. Throughout the negotiations for a new contract, which began in March 1981, as well as at the time of the work stoppage, the parties remained far apart on various issues, many of which did not concern health and safety matters. On March 10, the Union threatened to strike on April 30, the expiration date of the contract. Clearly, if the Union wished to stop work because of such conditions, it could have done so then, i.e., on March 10. The fact that the Union threatened that the work

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[2] The D.C. Circuit rejected the view that the abnormally dangerous condition must be the "sole cause" of the work stoppage. The court did not pass on what lesser test of causality would be appropriate.

stoppage would occur on April 30 speaks volumes as to the cause of such work stoppage. That fact clearly demonstrates that, even in the Union's view, the work stoppage was not proximately tied to abnormally dangerous conditions.

Further, there is no showing that plant conditions worsened between the March 10 threat, and the April 30 work stoppage. Thus, the proximate cause of the April 30 work stoppage, like the March 10 threat, was the bargaining dispute between the parties.

Finally, I note that the employees made an unconditional offer to return to work, at a time when conditions had not improved.

I recognize that the judge found that: "The overwhelming weight of the testimony establishes that the employees rejected the Respondent's final proposal and voted to strike because they believed that the working conditions at TNS were endangering their health."

However, that finding is based on the subjective testimony of employees, given long after the work stoppage had occurred. In my view, the causality test should be based on objective evidence at the time of the work stoppage.

In sum, the "but for" causation standard is not met here. Thus, the employees' work stoppage did not meet the criteria of Section 502.

2. Section 502 does not prohibit permanent replacement

Even if I found that the "but for" standard was met, or if I agreed with my colleagues' lower causation standard, I would still find that the Respondent acted lawfully here. In this regard, I disagree with my colleagues' view that permanent replacement is precluded by Section 502.

For purposes of this discussion, I will assume that, whatever test is applied, we confront here the quitting of work by employees in good faith because of abnormally

dangerous conditions for work. My colleagues' view essentially amounts to this syllogism: pursuant to Section 502, the employees at issue were not strikers; because they were not strikers, they were not economic strikers; because they were not economic strikers, they could not lawfully be permanently replaced. It is, however, just as logical to hold that because the employees at issue were not strikers they were not unfair labor practice strikers and were therefore not immune from permanent replacement. The fact is that they were neither economic strikers nor unfair labor practice strikers. Indeed, they were not strikers at all; they were "quitters." The issue is whether these "quitters" should be immune from permanent replacement.

Section 502 was intended to permit employees to engage in a work stoppage without running the risks of (1) being discharged for breaching a no-strike clause or (2) losing all protection of the Act because of the "loss of status" provision of Section 8(d). These purposes are achieved without according the employees the "superprotection" of immunity from permanent replacement. That is, it is sufficient that these employees can walk out and be protected from discharge, even if there is a no-strike clause, and even though they failed to comply with Section 8(d).

As noted *supra*, there are good reasons for not treating Section 502 stoppages like unfair labor practice strikes. That is, the employer is not a wrongdoer at all, at least insofar as the Act is concerned. Such an employer should be allowed to attempt to persuade potential replacement employees to come to work. And, such employees should be free to accept permanent employment, if they are of the view that the employees who walked out had an exaggerated view of the danger (if any) at the workplace.

By contrast, a wrongdoing employer (i.e., one who has committed unfair labor practices) should not be permitted to benefit from his own malfeasance through the mechanism of

permanent replacement. Unfair labor practice strikers are accorded the "superprotection" of immunity from permanent replacement because their actions vindicate the most fundamental policies of the Act. That is not true of those who are not unfair labor practice strikers.

With respect to the legislative history adduced by my colleagues, I will limit myself to a few observations. In my view, although it is not certain what Congress intended by enacting Section 502, my review of this provision and its legislative context leads me to believe that the more reasonable view is that Congress did not intend to protect Section 502 work stoppage participants from permanent replacement. This belief is founded on: the absence of specific language conferring such protection; the historical origin of the specific language of the third clause in Section 502 as a response to loss-of-employee-status sanctions of Section 8(d), rather than to permanent replacement; the fact that, among all work stoppage participants, only unfair labor practice strikers enjoyed such special protection at the time of the passage of Section 502; the failure of Congress to make the maintenance of abnormally dangerous conditions an unfair labor practice or to prevent an employer from continuing operations under such conditions; the total absence of any indication of Congressional intent to limit the Mackay[3] doctrine permitting permanent replacement of employees engaged in work stoppages; and the identification of protections accorded by Section 502 which give substance and meaning to Congress' protective intent without prohibiting permanent replacement of 502 work stoppage participants. These protections include the guarantee of immediate reinstatement for Section 502 work stoppage participants who are not replaced, upon their offering to return to work, without fear of any retaliation by the

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[3] *NLRB v. Mackay Co.*, 304 U.S. 333 (1938).

employer, even if they quit work during an 8(d) notice period or during the term of a contract with a no-strike provision.

Precedent also counsels a restrained reading of the scope of Section 502. The cases suggest that Congress was concerned about the perceived evil of having a no-strike clause apply under abnormally dangerous conditions. In *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368 (1974), the Supreme Court held that the safety dispute at issue was not a Section 502 work stoppage. In discussing Section 502, the Court stated that Section 502 "provides a limited exception to an express or implied no-strike obligation." *Id.* at 385. The Court reiterated this view in *Whirlpool Corp. v. Marshall*, 445 U.S. 1 fn. 29 (1980), stating that the "effect of [Section 502] is to create an exception to a no-strike obligation in a collective bargaining agreement."

The Board has likewise interpreted Section 502 as being confined to creating a limited defense for employees who engage in work stoppages despite a no-strike ban. In *Knight Morley Corp.*, 116 NLRB 140 (1956), *enfd.* 251 F.2d 753 (6th Cir. 1957), *cert. denied* 357 U.S. 927 (1958), a blower system in a plant buffing room broke down allowing dirt and abrasives from plant machinery to be blown into employees' faces and causing the temperature to rise to 110 degrees. The Board found that the conditions were abnormally dangerous. Accordingly, it held that employees who walked out in response to such conditions were protected under Section 502 "even in the face of a no-strike clause in their contract with an employer." *Id.* at 146. The Board stated further that it could "conceive of no other reasonable purpose" for Section 502 beyond the declaration by Congress that a 502 work stoppage is "not to be a 'strike' in order to give protection to such a walkout, without regard to limitations on strikes such as those imposed by 'no-strike' clauses or by Section 8(d)." *Id.* The prevalent view among the courts of appeals also is that Section 502 simply provides a limited exception to a no-strike

obligation. *See*, e.g., *NLRB v. Tamara Foods, Inc.*, 692 F.2d 1171, 1183 (8th Cir. 1982) (there was no collective-bargaining agreement in this case, to make Section 502 applicable).[4]

In *Philadelphia Marine Trade Assn.*, 138 NLRB 737 (1962), *enfd.* 330 F.2d 492 (3d Cir. 1964), the Board held that the Respondents' method for unloading cargo from the ship Caribe was abnormally dangerous. Consequently, a refusal by longshoremen to unload the ship "under Section 502 of the Act was not a strike, even assuming the existence of a no-strike contract." *Id.* at 739. Furthermore, the Board held that the Respondents violated Section 8(a)(3) when they retaliated against the protected Section 502 work stoppage by locking out all area longshoremen and by insisting that the lockout would remain in effect until the Caribe longshoremen agreed to return to work under the same abnormally dangerous conditions. In my view, this case does not support a prohibition of permanent replacement. The work stoppage was not a strike. It was therefore not in breach of any no-strike clause. And, the lockout was not in pursuit of a bargaining objective but rather was in retaliation for the protected work stoppage.

In the instant case, the judge originally dismissed as unpersuasive the restrictive definition of Section 502 by the Supreme Court in *Gateway Coal* and in *Whirlpool* by stating that "neither of these cases hold that the sole effect of

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[4] *Clark Engineering v. Carpenters*, 510 F.2d 1075, 1080 (6th Cir. 1975), is not to the contrary. There, the court stated in passing that "[w]hen a work stoppage properly results from abnormally dangerous working conditions, an employer cannot resort to the weapons available to him in an economically-motivated work stoppage." The court provided no explanation of this dictum, including whether it was meant to encompass the "weapon" of permanent replacement. It did state that "the policy of LMRA Sec. 502 is not involved in the present case," *id.*, which was a Sec. 303 damages suit against the union for an alleged secondary boycott.

[Section 502] is to create an exception to a no-strike obligation in a collective-bargaining agreement." I agree that those cases do not so hold, but neither do they hold the contrary. And, as discussed above, the legislative purpose of Section 502 can be accomplished without denying the employer the privilege of permanent replacement. Further, the limited exception to a no-strike clause reinforces my view, based on the language and legislative history of Section 502, that an employer is not prohibited from permanently replacing employees who quit work pursuant to Section 502.

Although finding that the work stoppage was not a "strike" and that the maintenance or failure to correct abnormally dangerous conditions was not an unfair labor practice, the judge found the Respondent's hiring of permanent replacements was "inherently destructive" of the employees' Section 7 rights, in violation of 8(a)(3) and (1). In my view, the judge has mischaracterized the legal presumptions arising from the act of replacement during a lawful work stoppage. As the Supreme Court first explained in Mackay, permanent replacement, in and of itself, is not an unfair labor practice. 304 U.S. at 346. Rather, it has traditionally been regarded as a permissible employer response to an employee walkout in order to promote the fundamental right of an employer to "protect and continue his business." *Id.* Further, as noted by the Supreme Court, absent evidence of an independent unlawful purpose, the Board presumes that an employer's motive in permanently replacing its employees is to serve its legitimate business interest of continuing operations. *Belknap v. Hale*, 463 U.S. 491, 504 fn. 8 (1983), citing with approval, *Hot Shoppes, Inc.*, 146 NLRB 802 (1964). Given this interest, the Board does not require employers to justify the choice of permanent, as opposed to temporary, replacement.

NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963), relied on by the judge, is not to the contrary. There, in addition to hiring permanent replacements during a strike, the employer

granted them 20 years of superseniority. It was this additional independent act, not permanent replacement, which the court found inherently destructive of employee rights and bearing its own indicia of improper intent, suggesting that the probable motive behind the replacement decision was to punish the employees. Absent the unlawful grant of superseniority, the court was unequivocal in reaffirming the permanent replacement principle of *Mackay*. Particularly pertinent here, the court stated that although "it may be . . . that 'such a replacement policy is obviously discriminatory and may tend to discourage union membership' . . . the employer's interest must be deemed to outweigh the damage to concerted activities caused by permanently replacing strikers. . . ." 373 U.S. at 232.

Thus, the Supreme Court in Erie Resistor has defined the act of permanent replacement as less than inherently destructive of the statutory right to strike, a right which lies at the very core of Section 7. *See United Steelworkers v. NLRB*, 376 U.S. 492, 499 (1961). Assuming that the right to engage in a Section 502 work stoppage is entitled to the same deference as the right to strike, it is reasonable to conclude that an employer's decision to continue business with permanent replacements during such a work stoppage is not inherently destructive of this protected right.

I further disagree with the judge's assessment that permanent replacement is equivalent to discharge, and that both acts operate as an unlawful "penalty" against the exercise of the protected Section 502 right. The difference between discharge and permanent replacement is now well established in the law. The discharged striker has no rights to reinstatement. The permanently replaced striker has a right to reinstatement as soon as the replacement leaves or there is otherwise a vacancy in his prior position. Thus, there is meaning to the legal principle that the striker cannot be discharged for striking but he can be permanently replaced.

For these reasons, the act of permanent replacement of strikers is not inherently destructive of employee rights. The striker retains rights of reinstatement. As the Board stated in *Torrington Construction Co.*, 235 NLRB 1540, 1541 (1978), "[a]lthough earlier cases, including [*Rockaway News*], have sought to diminish the distinction between discharge and replacement," in light of the preferential rehiring status given there exists a substantial difference between replacement and discharge."

I do not gainsay the adverse impact of permanent replacement, but it can no longer be reasonably maintained that this action is equivalent to discharge. With the principles of *Fleetwood Trailer* and *Laidlaw* now firmly established,[5] it becomes even more reasonable to interpret Section 502 as prohibiting retaliatory discharges but permitting the hiring of permanent replacements. The remaining cases relied on by the judge are consistent with this interpretation. For instance, both Knight Morley, supra, and Combustion Engineering, Inc., 224 NLRB 542 (1976), involved the unlawful discharge of employees engaged in a Section 502 work stoppage. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962), again involved the discharge of striking nonunion employees who ceased work in protest of uncomfortable, but not abnormally dangerous, work conditions. Finally, as previously discussed, *Philadelphia Marine* involved the punitive and retaliatory lockout of employees, who had not previously participated in any work stoppage, in order to compel the return to work under continuing abnormally dangerous working conditions of employees participating in a protected Section 502 work stoppage.

It may well be that permanent replacement has some impact on the right to engage in a Section 502 work stoppage.

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[5] *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967); *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enfd.* 414 F.2d 99 (7th Cir. 1969).

However, as set forth in *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), the employer's interest in operating its business during the work stoppage is an economic justification that outweighs the limited impact on employee rights.

In sum, I find that an employer, whose employees have quit work because of abnormally dangerous working conditions within the meaning of Section 502, does not violate the Act by choosing to hire permanent replacements to continue business. It is clearly reasonable to permit the hiring of permanent replacements, in light of the foregoing review of Section 502's language, its legislative background, and relevant Board and judicial precedent. Accordingly, I find that the Respondent did not violate Section 8(a)(3) and (1) by permanently replacing and failing to reinstate employees who ceased work in protest of alleged abnormally dangerous working conditions.[6] Consequently, I conclude that the Respondent also did not violate Section 8(a)(5) by withdrawing recognition from the Union based on the decertification petition signed by the replacement employees.

I would dismiss the complaint in its entirety.

Dated, Washington, D.C. September 30, 1999

Peter J. Hurtgen, Member

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[6] I take this position where, as my colleagues find here, it is shown that employees have walked out because of their good-faith belief, supported by ascertainable, objective evidence, that their working conditions are abnormally dangerous. I express no view as to whether an employer who maintains conditions that are, objectively, abnormally dangerous (i.e., "danger in fact") may lawfully hire permanent replacements for employees who have quit work because of those conditions.

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discourage membership in or adherence to the Oil, Chemical and Atomic Workers International Union, AFL-CIO, or to any other labor organization, by threatening to permanently replace or, upon their unconditional offer to return to work, failing to reinstate our employees who in good faith engaged in a work stoppage over abnormally dangerous working conditions, or discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT refuse to bargain collectively with the Union as the exclusive representative of employees in the following appropriate unit:

All hourly paid production and maintenance employees employed at our Jonesboro, Tennessee, facility, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL offer all eligible employees who engaged in the work stoppage protesting abnormally dangerous conditions which commenced on May 1, 1981, immediate and full reinstatement to their former, or substantially equivalent, positions without prejudice to their seniority or other rights and privileges previously enjoyed, and WE WILL make them whole for any loss of pay they may have suffered by reason of our discriminatory conduct.

WE WILL, on request, bargain collectively with the Oil, Chemical and Atomic Workers International Union as the exclusive bargaining representative of all our employees in the above-described appropriate unit with respect to rates of pay, wages, hours, and other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

APPENDIX C

TITLE 29.—LABOR

CHAPTER 7.—LABOR-MANAGEMENT RELATIONS

GENERAL PROVISIONS

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29 USCS § 143 (2002)

§ 143. Saving provisions

Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act.

HISTORY: (June 23, 1947, ch 120, Title V, § 502, 61 Stat. 162.)

(2)

Sup. Ct.

NOV. 7 2002

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In The

Supreme Court of the United States

PAPER, ALLIED-INDUSTRIAL, CHEMICAL AND ENERGY WORKERS INTERNATIONAL UNION,

Petitioner,

v.

TNS, INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant certiorari to review the Sixth Circuit's unanimous decision to vacate an order of the National Labor Relations Board issued under "[a]n infrequently used provision of the NLRA," Pet. App. 2a, based in part on the Board's "inexcusable delay" in deciding the case, Pet. App. 32a-34a, where the Court of Appeals first determined that the Board's decision concerning the employer's liability was not supported by substantial evidence in the voluminous record created during the eighteen years that the case had been pending, and where the Court of Appeals found on the particular facts that any award of relief that might be ordered against the employer – assuming a liability finding that was supported by substantial evidence on a new record – would be inequitable in light of changed factual circumstances during the pendency of the case.

RULE 29.6 STATEMENT

Respondent TNS, Inc. is a wholly-owned subsidiary of Aerojet-General Corporation, which is in turn a wholly-owned subsidiary of GenCorp Inc., a publicly-owned corporation. Aerojet Ordnance Tennessee, Inc. is also an affiliate of TNS, Inc.

Petitioner is the Paper, Allied-Industrial, Chemical & Energy Workers International Union. It was an intervenor in the court below.

The National Labor Relations Board is also a respondent. S. Ct. Rule 12.6. The NLRB has not sought review of the decision below in this Court.

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BRIEF IN OPPOSITION

Respondent TNS, Inc. ("TNS") respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Sixth Circuit in this case.

INTRODUCTION

The petition does not meet any of the established criteria warranting certiorari. *See* S. Ct. Rule 10. Instead, Petitioner Paper, Allied-Industrial, Chemical & Energy Workers International Union ("Union") seeks relief from the well-reasoned, unanimous decision of the Sixth Circuit by attempting to manufacture a circuit split that, upon closer analysis, simply does not exist. At the same time, the Union ignores the fact that the Court of Appeals rejected its claim to relief on the merits after carefully considering the facts in the record and concluding that the National Labor Relations Board ("NLRB" or "Board") order against TNS was not supported by substantial evidence, despite the voluminous record created over the twenty years that this case has been ongoing. Appropriately, the Union has not sought review in this Court of that dispositive, fact-sensitive issue, but instead limits its challenge to the Sixth Circuit's method of disposing of the case after deciding the merits. The Board itself has not sought review in this Court of any aspect of the Sixth Circuit's opinion. Under these unique and extreme circumstances – a case that has been ongoing for over twenty years and in which, after careful review of the particular facts in the record, the Court of Appeals found that liability on the part of an employer had not been established – the Court of Appeals appropriately decided to vacate the Board's

order. No "compelling reason[ ]" or "important" issue justifies any further attention to this case by this Court. S. Ct. Rule 10.

COUNTERSTATEMENT

A. Factual Background.

This case arises from a labor dispute between respondent TNS and a labor union representing employees at TNS's Jonesboro, Tennessee facility, Petitioner Paper, Allied-Industrial, Chemical & Energy Workers International Union ("Union"). This dispute began more than twenty years ago in the spring of 1981. Pet. App. 3a-5a.

At its Jonesboro facility, TNS manufactures armor-piercing ammunition. One of the essential ingredients of this product is depleted uranium. Pet. App. 3a. Depleted uranium is a low-level radioactive substance that presents a potential health hazard only if ingested or inhaled in sufficient quantities or over a long period of time. *Id.* at 3a.

Because TNS's business involves the use and handling of a radioactive substance, the Nuclear Regulatory Commission ("NRC") and Tennessee Division of Radiological Health ("TDRH") monitor and regulate TNS's facility in order to protect workers and the public from any risks posed. During the relevant time period, the TDRH was primarily responsible, as a result of a delegation of authority by the NRC, for devising and enforcing health and safety regulations applicable to TNS's Jonesboro facility. Accordingly, the TDRH, occasionally accompanied by NRC officials, periodically inspected the Jonesboro facility. The TDRH was empowered to close facilities that did not

comply with applicable health and safety regulations. *Id.* at 41a.

Also during the relevant time period, TNS had in place a contaminant control system designed to reduce any depleted uranium dust in the workplace, and TNS closely monitored the safety and health of its employees. *Id.* at 41a-43a.

Leading up to the events giving rise to this case, TNS and the Union had a collective bargaining agreement in place that was set to expire at midnight on April 30, 1981. ALJ Decision 90-91 (hereinafter "ALJD ___") (filed as "Lodging Material" by petitioner with its petition). As that date approached, on March 10, 1981, the Union sent a letter to TNS expressing purported safety concerns with respect to the Jonesboro facility. Pet. App. 3a-4a. Then, on March 24, 1981, TNS and the Union began negotiations concerning a new collective bargaining agreement. *Id.* During the negotiations, the parties discussed the alleged safety concerns of the Union as well as other economic issues pertaining to the employees. *Id.* When the negotiations did not result in a new collective bargaining agreement, the employees walked out on May 1, 1981. *Id.*

In the nine months prior to the Union's work stoppage in May 1981, the TDRH inspected TNS's Jonesboro facility eight times, and found no situation warranting the revocation or suspension of TNS's operating license, nor did it find any other basis for taking any emergency action at the facility. *Id.* at 43a. In fact, the inspection immediately prior to the work stoppage found "no crisis or eminent [sic] threat to health and safety." *Id.* at 22a. The employees, however, claimed that their walkout was protected by § 502 of the NLRA. That "infrequently used provision," *id.*

at 2a, provides that "the quitting of labor by * * * employees in good faith because of abnormally dangerous conditions * * * [shall not] be deemed a strike." 29 U.S.C. § 143. The Union asserted that the walkout did not qualify as a "strike" because it was motivated by a good faith belief that the conditions in the workplace were abnormally dangerous.

On July 7, 1981, TNS advised the Union that unless the employees agreed to return to work, it planned to hire permanent replacements beginning on July 16, 1981. Pet. App. 5a. The employees did not return to work, and TNS hired permanent replacements. *Id.* Then, in February 1982, the Union made an unconditional offer to return to work. By that time, however, TNS had hired permanent replacements, and, consequently, refused to reinstate the striking employees other than to fill vacancies as they occurred. *Id.* Subsequently in May 1982, the employees sought to decertify the Union, at which point TNS withdrew recognition and refused to bargain further with the Union. *Id.* at 45a-46a.

Next, in August 1982, the striking employees turned to the NLRB, commencing the case that now, twenty years later, is before this Court.

B. Course of Proceedings

As the court below explained, this case has a "complicated procedural history." Pet. App. 26a. Pursuant to a series of unfair labor practice charges filed by the Union, the NLRB's General Counsel filed complaints against TNS in August 1982 and April 1983, which were subsequently consolidated. ALJD 2. The complaints alleged (1) that TNS violated §§ 8(a)(1) and (3) of the NLRA by refusing to

reinstate the striking employees when they offered to return to work and (2) that TNS violated § 8(a)(5) of the Act when it withdrew recognition and refused to bargain with the Union. Pet. App. 39a. These complaints were premised on the contention that the work stoppage was protected by § 502 of the NLRA, 29 U.S.C. § 143. Section 502 is a seldom-used provision which states that a work stoppage does not qualify as a "strike" when it is motivated by the employees' good faith belief that their working conditions are "abnormally dangerous."

1. Proceedings before the Administrative Law Judges

The matter was initially assigned to an ALJ who considered several motions and conducted some evidentiary hearings between April and September 1983. The ALJ was eventually recused, and the case assigned to a different ALJ. Afterwards, the replacement ALJ began conducting evidentiary hearings in November 1983. Over the following eighteen months, the ALJ conducted sixty-seven days of trial. The evidentiary proceedings closed on April 3, 1985, already almost four years after the employees walked off their jobs and almost three years after the Board's General Counsel filed the first complaint. This concluded the creation of the evidentiary record in this case – a prodigious record of almost 13,000 pages of testimony and hundreds of exhibits totaling in excess of 23,000 pages. ALJD 2-3.

Two years later, on July 31, 1987, the ALJ issued her recommended decision, concluding that TNS had committed an unfair labor practice by permanently replacing and refusing to reinstate the striking employees upon their

unconditional offer to return to work, and finding that the employees' actions were protected by § 502 of the NLRA. ALJD 147-148. The ALJ recommended the reinstatement of the employees to their former positions or, if the positions were unavailable, to substantially equivalent positions, all without prejudice to their seniority or any other rights enjoyed prior to the work stoppage. *Id.* at 157-158. The ALJ further recommended that the employees be awarded backpay, and that TNS be ordered to resume bargaining with the Union. *Id.*

2. Proceedings before the Board

The case next moved to the NLRB for its consideration of the ALJ's recommended decision. Over five years later, on December 23, 1992, a four-member panel of the Board rejected the ALJ's findings, concluding that the record did not support a finding that TNS had violated § 502. *TNS, Inc.*, 309 N.L.R.B. 1348 (1992). Although three of the panel members agreed that TNS had not engaged in unlawful activity, the panel was fractured as to the basis for this conclusion. Pet. App. 6a.

3. Proceedings before the D.C. Circuit

The Union petitioned the Court of Appeals for the District of Columbia Circuit to review the Board's decision. On February 14, 1995, that court concluded that it could not discern the basis for the Board's decision and remanded the case for further review and for an explanation of the basis for the Board's decision that commanded a majority of the Board. *Oil, Chem. & Atomic Workers Int'l Union v. NLRB*, 46 F.3d 82, 88-93 (D.C. Cir.), *cert. denied*, 516 U.S. 821 (1995).

4. More Proceedings before the Board

On remand to the NLRB, the matter was assigned to a new three-member panel. Pet. App. 35a. The Board considered the case for another four years before issuing a new decision, this time articulating a new standard for assessing liability under § 502:

> In order to establish that a work stoppage is protected under Section 502, the General Counsel must demonstrate by a preponderance of the evidence that the employees believed in good-faith that their working conditions were abnormally dangerous; that their belief was a contributing cause of the work stoppage; that the employees' belief is supported by ascertainable, objective evidence; and that the perceived danger posed an immediate threat of harm to employee health or safety. [*Id.* at 38a-39a.]

Upon examining the same evidentiary record that had been before it the first time around, the Board now concluded that the work stoppage involved in this case satisfied each of the newly-announced elements, and was therefore protected by § 502. *Id.* at 39a. Therefore, the Board concluded that TNS violated § 502 by failing to reinstate the employees after their unconditional offer to return to work seventeen years earlier in February 1982. *Id.* The Board also ordered TNS to resume bargaining with the Union. *Id.* at 66a.

5. Proceedings before the Sixth Circuit

TNS petitioned the Sixth Circuit to review the Board's decision, and the NLRB cross-applied for enforcement of its order. The Union – the only petitioner before this Court – intervened. In a unanimous decision, the Sixth Circuit

decided that the Board's formulation of the legal test for liability under § 502 was entitled to deference, but that the Board's factual determination that TNS had violated that provision was not supported by substantial evidence in the record. After discussing the evidence in the voluminous record said to support the Board's decision, the court below concluded:

> In the present case, three of the four pieces of evidence relied upon by the Board are not terribly persuasive, and one piece of evidence (the respirator use) is either irrelevant to the danger inquiry or evidence of improved conditions. When we also take into account the NRC and TDRH standards and those agencies' lack of decisive regulatory action as evidence contradicting that evidence, it becomes clear that the Board's conclusion – that objective evidence supported the employees' belief that their workplace had become too dangerous to work in – is simply not supported by substantial evidence on the record considered as a whole. [Pet. App. 32a.]

Next, the court addressed the issue of the Board's extraordinary delay in handling the case. The court began by noting that "denying enforcement of an order solely on the basis of delay is inappropriate," and quoted from this Court's decision in *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969). Pet. App. 32a. The court noted, however, that "courts sometimes refuse to enforce agency awards when undue delay has made their enforcement inequitable." *Id.* at 33a. The court then reviewed the particular facts that warranted vacating rather than remanding the order to the NLRB for still further proceedings:

> [T]he case was filed with the Board in 1982. The Board's ALJ did not issue a decision until 1987.

> The Board did not issue its decision affirming the ALJ until 1992, more than five years later. After remand by the District of Columbia Circuit in 1995, the Board did not issue its second decision until September 1999, more than four years later. This court does not see a reasonable way to hold the Company responsible for damages accruing over all of this time, especially when its structure and business changed in the interim. [*Id.* at 34a.]

It is that part of the court's decision that is the subject of the Union's petition for a writ of certiorari. The NLRB itself has not sought review in this Court.

REASONS FOR DENYING THE WRIT

Compared to the long history of this case, the merits of the Union's petition warrant briefer treatment. The only question presented in the Union's petition asks the Court to grant certiorari to review whether it was appropriate for the Sixth Circuit to vacate, rather than remand, the decision of the NLRB after that court determined that the NLRB's factual findings in its order were not supported by substantial evidence in the record, and, consequently, that after 18 years of litigation in this case, no violation of the applicable labor laws had been shown on the part of TNS. Under these unusual circumstances, the Sixth Circuit decided that vacatur, rather than remand, was appropriate and that this case should come to a long-overdue conclusion.

The Sixth Circuit's decision is perfectly consistent with this Court's precedent, as well as the decisions from other courts of appeal. The conflict that the Union seeks to

depict in its petition is illusory. Moreover, under the unique and extreme circumstances of this case, the Sixth Circuit's decision to vacate the NLRB's order was an appropriate response to the Board's inordinate and inexcusable delay in handling this case. This is particularly true in light of the Court of Appeals' primary holding that the factual underpinnings of the Board's order were not supported by substantial evidence in the record. In light of that holding, a remand would have served no practical or legal purpose and would only have resulted in additional delay and expense in this decades-old case. Therefore, this case does not present the type of important issues of public concern that warrant this Court's attention.

I. THE SIXTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE PRECEDENT OF THIS COURT OR OF OTHER COURTS OF APPEAL.

1. There is no conflict between the Sixth Circuit's decision and the precedent of this Court or of the other courts of appeal, much less a conflict "on the same important matter." S. Ct. Rule 10. After concluding that the NLRB's order was not entitled to be enforced because the Board's factual findings were not supported by substantial evidence, the Sixth Circuit turned to TNS's argument that, as a result of the NLRB's inexcusable and unnecessary delay in deciding this case, it would be inequitable to enforce any order against TNS in light of the changed circumstances at the company.

The first thing the Sixth Circuit did in addressing this argument was acknowledge the very Supreme Court case that the Union is now saying it violated, *NLRB v. J. H. Rutter-Rex Mfg. Co.* In that case, this Court considered the propriety of the Fifth Circuit's decision to modify an NLRB

order in response to the Board's "inordinate delay," by eliminating the employer's obligation to pay backpay accruing after a certain date. 396 U.S. at 262. In rejecting the actions of the lower court, this Court noted that the NLRB has broad remedial powers subject to limited judicial review "upon finding that an unfair labor practice has been committed." *Id.* at 262-263. The Court recognized that backpay awards are a traditional remedy available to the NLRB designed, in part, "to restore, so far as possible, the status quo that would have obtained but for the wrongful act." *Id.* at 265. The Court rejected the Fifth Circuit's modification of the NLRB's remedy because that modification "left the employees who had not been reinstated * * * worse off than they would have been but for the company's wrongful action," and stated:

> Either the company or the employees had to bear the cost of the Board's delay. The Board placed that cost upon the company, which had wrongfully failed to reinstate the employees. In an effort to discipline the Board for its delay, the court shifted part of that cost from the wrongdoing company to the innocent employees. * * * This Court has held before that the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers. [*Id.* at 263-265.]

Likewise, the Sixth Circuit acknowledged this Court's subsequent decision in *NLRB v. International Association of Bridge, Structural & Ornamental Ironworkers, Local 480*, 466 U.S. 720 (1984), in which this Court applied the *Rutter-Rex* holding in the context of a court of appeals' decision to modify an NLRB order – again as a result of the Board's delay – by eliminating certain employees'

entitlement to backpay. Citing *Rutter-Rex*, this Court explained that a "Court of Appeals may not refuse to enforce a backpay order *merely* because of the Board's delay subsequent to that order in formulating a backpay specification." 466 U.S. at 724 (emphasis added). As did the Court in *Rutter-Rex*, the Court again focused on the impropriety of denying backpay to "wronged employees" as a result of the Board's delay. *Id.* at 725 (quoting *Rutter Rex*, 396 U.S. at 265).

In both *Rutter-Rex* and *Ironworkers*, this Court was concerned that costs related to the Board's delay not be shifted from a "wrongdoing employer" to "wronged employees." Both cases involved delays in the *compliance* stage of an NLRB proceeding, after it had been established that the employees had in fact been "wronged" and that the employer had violated the labor laws. Under those circumstances, the balance of the equities is understandably tilted in favor of the employees in allocating the consequences of the NLRB's delay.

In contrast to these decisions from this Court, which the Sixth Circuit below expressly acknowledged, this case does not involve a court's decision to modify the remedies to which "wronged employees" are entitled. After twenty years of legal wrangling over the issue of liability under § 502, the Sixth Circuit concluded, based on a careful review of the facts in the record, that the NLRB had not shown that TNS violated its employees' rights under the NLRA at all. And it bears repeating that neither the Union nor the NLRB have asked this Court to review that issue. Therefore, unlike the employees involved in *Rutter-Rex* and *Ironworkers*, it has not been shown that the employees in this case were "wronged." Instead, as the Sixth Circuit's decision recognized, the equities in this case favor

the employer, which has not been shown to have violated the relevant labor laws, but has nonetheless spent twenty years defending itself. Therefore, the absence of liability on the part of TNS – in addition to the extreme factual circumstances concerning the Board's delay – makes this case completely distinguishable from the precedent on which the Union relies. Because the Sixth Circuit recognized, and acted consistent with, this Court's authorities, there is no reason for the Court to grant the Union's petition in this case.

2. Nor does the lower court's decision conflict with the decisions of other courts of appeals. In arguing to the contrary, the Union primarily relies on the opinion of the D.C. Circuit in *Southwest Merchandising Corp. v. NLRB*, 943 F.2d 1354 (1991). For the same reasons that the Sixth Circuit acted consistently with this Court's precedent, however, its decision does not conflict with *Southwest Merchandising*. In that case, an employer argued that as a result of a four-and-a-half year delay by the Board in reviewing an ALJ's decision, the court should refuse to enforce the NLRB's order. Relying on *Rutter-Rex*, the D.C. Circuit rejected the employer's argument under the facts of that case, but did not rule out the possibility that the court "[had] the authority to invoke laches against the Board in an extraordinary case." *Southwest Merch.*, 943 F.2d at 1358.[1]

[1] Although the D.C. Circuit determined that a remand was necessary in *Southwest Merchandising* given ambiguity in the Board's order, *see id.* at 1358-62, following the remand, the court enforced, in part, the Board's order against the employer. *See Southwest Merch. Corp. v. NLRB*, 53 F.3d 1334, 1344 (D.C. Cir. 1995). Therefore, unlike

(Continued on following page)

Unlike here, the court in *Southwest Merchandising* had not already rejected a finding of liability when asked to put an end to Board proceedings because of delay. Moreover, unlike here, the delay did not stretch over two decades, but instead was a relatively short four-and-a-half years. In addition, the *Southwest Merchandising* court specifically left open the possibility that Board delay might result in nonenforcement "in an extraordinary case." 943 F.2d at 1358. There is no reason to assume that the court would not agree with the court below that this was just such an "extraordinary" case.

Nor does the case before the Court conflict with the D.C. Circuit's decision in *Consolidated Freightways v. NLRB*, 892 F.2d 1052 (D.C. Cir.), *cert. denied*, 498 U.S. 817 (1990), another case cited by the Union in its petition. That case amounts to little more than a straightforward application of *Rutter-Rex*. In *Consolidated*, the court held that it would enforce the Board's award of backpay despite the Board's delay of six years in deciding a case following a remand. *Id.* at 1059. There again, because liability on the employer's part was established in that case, it has no bearing on the Sixth Circuit's actions below.

Finally, the Union seeks support from a portion of the Seventh Circuit's decision in *NLRB v. Thill, Inc.*, 980 F.2d 1137 (7th Cir. 1992). In *Thill*, the court explained that despite delay on the part of the Board, the NLRB appropriately awarded interest on an award of backpay in a

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the case before the Sixth Circuit, the D.C. Circuit never concluded that the NLRB's factual findings concerning liability were not supported by substantial evidence in the record.

case in which "those workers' entitlement to backpay cannot be doubted." *Id.* at 1141. Under those circumstances, the court correctly recognized that "the company was not harmed, so far as the backpay order [was] concerned * * * [because] [t]he Board's delays meant that the company had that much more time to enjoy the use of the money that it should have given to its workers back in 1981." *Id.* This holding sheds no light on the situation in the case now before the Court, and in no way creates a split of authority between the circuits. Indeed, as discussed below, a later part of the *Thill* decision supports the actions taken by the Sixth Circuit in this case, because the Seventh Circuit went on to deny enforcement of some portions of the Board's order in light of its delay. *Id.* at 1143. *See also NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62 (2d Cir. 1992) (following similar approach and concluding that delay was not basis for reducing damages but was basis for refusing to enforce bargaining order where underlying circumstances had changed).

This Court has long followed the policy of "not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeals." *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). No such conflict or issue of importance exists here warranting this Court's review.

3. Moreover, the Sixth Circuit's approach in this case is consistent with this Court's decision in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), concerning the role of courts of appeals in enforcing the Board's orders, and with several decisions from other courts of

appeals recognizing that courts have discretion under exceptional circumstances to decline to enforce NLRB orders which follow an inexcusable delay.

First, the Sixth Circuit faithfully followed *Universal Camera* throughout its decision in this case, including this Court's recognition of the responsibility imposed on the courts of appeals in deciding whether NLRB orders should be enforced. In *Universal Camera*, this Court acknowledged this important role for courts of appeals, stating:

> [C]ourts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is no less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. [340 U.S. at 490.]

Cf. Rutter-Rex, 396 U.S. at 264-266 (acknowledging this basic tenet, although concluding that delay did not excuse enforcement "in this case"). Therefore, this Court has recognized that courts of appeals play an important role in ensuring the fair enforcement of the nation's labor laws, as the Sixth Circuit did in this case.

Furthermore, in cases with facts similar to this case, other courts of appeal have followed the same approach as the Sixth Circuit below. In the most analogous case – in that it also involved a court finding that the Board's

liability determination was unsupported – the Second Circuit in *Emhart Industries v. NLRB*, 907 F.2d 372 (2d Cir. 1990) reached the same result as the court below. In that case, the court of appeals considered an order by the NLRB finding that an employer had committed an unfair labor practice "almost six years earlier." *Id.* at 373-374. As an initial matter, as in the case now before the Court, the Second Circuit found that the Board's factual findings were not supported by substantial evidence in the record. *Id.* at 376-378. The court then continued, however, by noting that "[a]lthough the reasons explained above provide a more than adequate basis for our decision, we believe that the board's inexcusable delay in deciding this case – or, more precisely, the effects of that delay on the efficacy and reasonableness of the board's remedy – provide an independent ground for denying enforcement." *Id.* at 378.

In explaining this conclusion, the Second Circuit noted the importance of a speedy resolution to labor cases in order for remedies to be effective, and stated that both employees and employers may be harmed by excessive administrative delay. *Id.* at 379. The court also recognized that in cases like *Rutter-Rex* and *Ironworkers*, where a court is asked to consider the effects of delay on the part of the Board only after the Board has found a violation on the part of an employer, "the majority view seems to have been that denying enforcement on the ground of delay alone unfairly 'punishes employees for the Board's nonfeasance.'" *Id.* at 379 (quoting *Ironworkers,* 466 U.S. at 725 and citing *Rutter-Rex*). Nonetheless, the Second Circuit also noted that this Court had recognized that "the courts of appeals are charged by [C]ongress with 'responsibility

for the reasonableness and fairness of Labor Board decisions.'" *Id.* (quoting *Universal Camera*, 340 U.S. at 490).

On the facts before it the Second Circuit concluded that "the passage of time between the company's action and the board's remedy has so changed the underlying situation at Emhart that enforcement of the order now not only would undermine more labor policies that [sic] it would advance, but also would mock reality." *Id.* at 379-380.

Similarly, in *Olivetti Office U.S.A., Inc. v. NLRB*, 926 F.2d 181 (2d Cir.), *cert. denied*, 502 U.S. 856 (1991), the Second Circuit went even further by finding that an award of backpay should be modified in light of the Board's delay. The court noted that "[e]lementary considerations of fairness" come into play when deciding whether to enforce a Board order, and stated that courts should not enforce orders where changed circumstances would result in a remedy that is "draconian" to an employer. *Id.* at 189.

Other circuits also recognize that changes to underlying circumstances that result during an unreasonably long delay by the Board may justify declining enforcement. For example, in *Thill*, which the Union cites for its straightforward application of *Rutter-Rex*, the Seventh Circuit went on to note that other portions of the Board's order were unenforceable as a result of the changed circumstances during the Board's delay. *See Thill*, 980 F.2d at 1142-43. The court acknowledged the "general rule" that the Board "has broad discretion in the formulation of remedial orders," but noted that the courts of appeal also are delegated the responsibility of determining whether orders should be enforced. *Id.* at 1142. In light of the seven year delay in *Thill* between the conclusion of the ALJ's

proceedings and the NLRB's order, and in the absence of arguments by the Board explaining "why the passage of time had not destroyed the order's utility," the court concluded that enforcement of the part of the order requiring the employer to bargain with the Union was inappropriate. *Id. See also Litton Microwave Cooking Prods., Div. of Litton Systems, Inc. v. NLRB*, 949 F.2d 249, 253 (8th Cir. 1991) ("We do not hesitate to deny enforcement of dilatory Board orders" where passage of time has "changed the underlying situation"), *cert. denied,* 503 U.S. 985 (1992).

4. In any event, as the Union's petition evidences, there are at best a handful of cases dealing with the question presented – and none of those cases conflicts with the Sixth Circuit's decision. The question presented is thus not "important and recurring [in] nature," or otherwise deserving of the Court's attention. Robert L. Stern, *et al.*, *Supreme Court Practice* 228 (8th ed. 2002). At best, even if there were conflict between the circuits, it would amount to little more than the type of "academic or * * * episodic" conflict this Court has found not to warrant a grant of certiorari. *Rice v. Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).

Also, despite the NLRB's well-documented history of delay, *see, e.g., Emhart*, 907 F.2d at 378 ("Sadly, however, once a case is presented to the board, 'it appears to enter a new dimension – one where time has little meaning.'" (citation omitted)), the extreme circumstances of this particular case, including a twenty-year delay but still no supportable finding of liability, are mercifully unique. The Union has pointed to no cases on par with these egregious circumstances. That factual distinction makes this case fit neatly into the "extraordinary case" scenario envisioned even by the principal case on which the Union relies,

Southwest Merchandising, 943 F.2d at 1358, and it certainly prevents it from being an appropriate case for ironing out any minor differences in tone between the circuits.

The delay in this case is five times longer than that in *Rutter-Rex*, and also far exceeds the delay in all the cases relied upon by the Union. As noted by the court below, much has changed during the Board's twenty-year wrestling match with this case. Employees at TNS's Jonesboro facility have come and gone. Business contracts dictating the number of employees needed at the facility have come and gone. Any order requiring remedial action on the part of TNS related to the events of 1981 would serve no purpose, particularly if further proceedings, including the first new evidentiary proceedings in this case since 1985, were first required, as they would be, in order to show that TNS even did anything wrong. The Sixth Circuit acted appropriately in vacating the NLRB's order, in part in light of the Board's "inexcusable delay," and there is no reason for this Court to grant certiorari in this case.

II. THE ISSUE PRESENTED BY THE UNION HAS NO PRACTICAL SIGNIFICANCE IN LIGHT OF THE SIXTH CIRCUIT'S UNCHALLENGED RULING THAT THE FACTUAL FINDINGS IN THE NLRB'S ORDER WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

In addition to the fact that the Sixth Circuit's decision does not present a conflict with any other precedent, this Court should also deny the Union's petition because the narrow issue presented by the petition is of little or no consequence, either to the parties in this case or to the

public at large. Even if the Court were to grant the writ and ultimately rule in the Union's favor on the issue presented, the fact remains that the Union would be entitled to no relief from TNS because the court below – based on its careful review of the facts in the voluminous record in this case – held that the Board's liability ruling was not supported by substantial evidence. The Union has not sought review of that fact-intensive ruling, which involved a straightforward application of this Court's decision in *Universal Camera*, 340 U.S. 474, to the rather complicated facts of this case.[2] *See* S. Ct. Rule 10. The NLRB has not sought review of that or any other aspect of the Sixth Circuit's decision. This Court should not expend any more of its limited resources on the purely academic question presented by the Union.

In its petition, the Union misleadingly suggests that the court below refused to enforce the Board's Order "solely" because of the Board's inexcusable delay in handling this case. Pet. i. The thrust of the Sixth Circuit's opinion concerned an application of *Universal Camera* to the facts of this case, however, and the court unequivocally held that the Board's order was not supported by substantial evidence. Pet. App. 32a. In fact, the court resolved that dispositive issue prior to even addressing the impact of this matter's twenty-year odyssey through the NLRB.

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[2] In *Universal Camera*, this Court announced that findings of fact by the Board would be sustained only if supported by substantial evidence in the record, taking into account the entire record and any evidence that fairly detracts from the weight of that evidence in favor of a particular finding. 340 U.S. at 485-488.

As discussed above, the Sixth Circuit's primary basis for not enforcing the Board's order was that the record did not support the Board' finding that the employees' belief that their working conditions were "abnormally dangerous" was supported by "objective evidence" of that danger – a requirement for liability under § 502. *See* Pet. App. 26a-32a, 38a-39a. Engaging in a conventional *Universal Camera* review, the court below sifted through the facts in the record that were relied upon by the Board, and concluded that they did not provide substantial support for the Board's order, stating:

> As mentioned above, the Supreme Court has instructed that when reviewing fact-finding by the Board, courts are to determine whether the findings of fact are supported by substantial evidence by taking into account the evidence upon which the Board relies and "contradictory evidence or evidence from which conflicting inferences could be drawn." *Universal Camera*, 340 U.S. at 487. In the present case, three of the four pieces of evidence relied upon by the Board are not terribly persuasive, and one piece of evidence * * * is either irrelevant to the danger inquiry or evidence of improved conditions. When we also take into account the NRC and TDRH standards and those agencies' lack of decisive regulatory action as evidencing contradicting that evidence, it becomes clear that the Board's conclusion – that objective evidence supported the employees' belief that their workplace had become too dangerous to work in – is simply not supported by

> substantial evidence on the record considered as a whole. [Pet. App. 32a.[3]]

See also Universal Camera, 340 U.S. at 477 ("'substantial evidence is more than a mere scintilla.'" (citation omitted).

This analysis and application of *Universal Camera* meant that the decision of the Board could not stand. *See Universal Camera*, 340 U.S. at 488 ("Congress has * * * made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."). *See also* 5 U.S.C. § 706 ("The reviewing court shall * * * hold unlawful and set aside agency action, findings, and conclusions found to be * * * unsupported by substantial evidence in a case * * * reviewed on the record of an agency hearing provided by statute").

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[3] The Union asserts in its petition that this issue was raised *sua sponte* by the court below. Pet. 11. The Union is wrong. Throughout the long course of the proceedings in this case, TNS has contested this factual issue. This is evident from the exceptions TNS filed with the ALJ, from the exceptions and briefs filed with the Board, and from the arguments made to the Sixth Circuit. In fact, one of the headings in TNS's brief to the Sixth Circuit is entitled "No Objective Evidence Supports Belief of Abnormal Conditions," TNS's Brief to the Sixth Circuit at 55, and the Union itself devoted twenty-five pages of its Sixth Circuit brief to this issue. Therefore, it is no surprise that the court below noted: "We reject in part and accept in part TNS's challenges to the Board's fact-finding." Pet. App. 3a. In any event, whether the issue was raised *sua sponte* or not has no bearing on the question presented in the petition for certiorari because the Union does not seek this Court's review of that issue.

In light of this record, it is unclear what could be accomplished by another remand to the Board. The ALJ took evidence over the course of two years back in the early 1980s, and deliberated on that evidentiary record for an additional two years. The Board itself had that same evidentiary record before it for over nine additional years. And, given the size of the record (over 23,000 pages) and given that the relevant factual issue only concerns the objective evidence related to the danger posed by the working conditions in the Jonesboro facility in 1981 when the employees went on strike, the Board has not attempted to develop additional evidence in this case since 1985.

Given these circumstances, it is peculiar that the Union suggests that a remand or additional deliberations would serve any purpose in this case, particularly in light of the fact that no party to this proceeding requested that the Sixth Circuit remand the matter to the Board in the event of an adverse ruling. No reason exists for any such remand. No open evidentiary issue or question of law requiring resolution is present. No issue is in need of clarification. Given the enormous record in this case, it is hard to imagine that any such issue could exist, and the Union has not attempted to articulate one. In short, none of the bases typically associated with a need for a remand are present. *See, e.g., Manor West, Inc. v. NLRB*, 60 F.3d 1195, 1198 (6th Cir. 1995) (noting that where the record is fully-developed, remand is unnecessary).

Given this state of affairs, no legal – and certainly no practical – reason suggests why the Sixth Circuit should have prolonged this seemingly interminable case. That is even more true for this Court. The Court has recognized that a grant of certiorari is not appropriate with issues of

"isolated significance." *Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. at 76. This case does not even have that going for it; it has neither isolated nor public significance. Likewise, this Court limits itself to answering questions "in the context of meaningful litigation," and leaves other issues until they are "posed less abstractly" in future cases. *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959). These prudential concerns should also lead the Court to deny the petition in this case, rather than provide the type of "advisory opinion" or engage in the type of "academic" exercise that it has repeatedly eschewed. *Id.* at 184, 185. *See, e.g., Flast v. Cohen*, 392 U.S. 83, 96 (1968) ("And it is quite clear that 'the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions.'" (citation omitted)); *Rice*, 349 U.S. at 74 ("[T]his Court does not sit to satisfy a scholarly interest"); S. Ct. Rule 10.

The circumstances of this case bring to mind comments this Court made in a different administrative setting that ring true for this case:

> [I]n view of the fact that this controversy already dates back more than eight years, that is has been before the Court of Appeals twice and that the relevant standard is not hard to apply in this instance, we think this controversy had better terminate now. [*Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 621 (1966).]

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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No. 02-557

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In the Supreme Court of the United States

PAPER, ALLIED-INDUSTRIAL, CHEMICAL & ENERGY WORKERS INTERNATIONAL UNION, PETITIONER

v.

TNS, INC. ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

In this case, the National Labor Relations Board concluded that, when employees began a work stoppage on May 1, 1981, "objective evidence" supported the employees' good-faith belief that conditions at their work place had become abnormally dangerous. The question presented is whether the Board's "objective evidence" finding is supported by substantial evidence on the record considered as a whole.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 296 F.3d 384. The second supplemental decision and order of the National Labor Relations Board (Pet. App. 35a-83a) is reported at 329 N.L.R.B. 602.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 2002. The petition for a writ of certiorari was filed on October 8, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 502 of the Labor-Management Relations Act, 1947 (LMRA), 29 U.S.C. 143, provides, in relevant part: "[N]or shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter." In this case, the National Labor Relations Board established the following four-part test for determining whether a work stoppage is protected by Section 502 in cases involving "cumulative, slow-acting dangers to employee health and safety":

> [T]he General Counsel must demonstrate by a preponderance of the evidence that the employees believed in good-faith that their working conditions were abnormally dangerous; that their belief was a contributing cause of the work stoppage; that the employees' belief is *supported by ascertainable, objective evidence*; and that the perceived danger posed an immediate threat of harm to employee health or safety.

Pet. App. 38a-39a (emphasis added).

2. TNS, Inc. manufactures ammunition at a plant in Jonesboro, Tennessee. Pet. App. 3a, 40a. In 1981, petitioner represented TNS's employees for purposes of collective bargaining. *Ibid.* At that time, the ammunition produced by TNS contained depleted uranium (DU), a low-level radioactive substance. During the manufacturing process, DU dust was released into the air inside the plant. *Ibid.* DU, a carcinogen and toxic heavy metal, poses a threat to the kidneys if inhaled or ingested over a long period of time. *Ibid.* Because DU is radioactive, TNS's plant fell within the jurisdiction of the Nuclear Regulatory Commission, which had dele-

gated its regulatory authority to the Tennessee Division of Radiological Health (TDRH). *Id.* at 21a-22a, 41a.

Petitioner's collective-bargaining agreement with TNS was set to expire on April 30, 1981. Pet. App. 44a. In March, petitioner advised TNS that employees in the bargaining unit would cease working upon expiration of the contract and would not return to work until TNS corrected certain safety violations identified by TDRH. *Id.* at 3a-4a, 44a. On May 1, 1981, the employees began a work stoppage. After initially shutting down the plant, TNS resumed partial operations by hiring permanent replacement workers. *Id.* at 44a, 45a. On February 15, 1982, petitioner made TNS an unconditional offer to return to work on behalf of the employees who were engaged in the work stoppage. *Id.* at 5a, 45a. Citing its hiring of permanent replacements, TNS declined petitioner's offer. *Ibid.*

3. Acting on charges filed by petitioner, the Board's General Counsel issued a complaint in August 1982 alleging that TNS committed an unfair labor practice under Section 8(a)(3) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(3), by hiring permanent replacements for and refusing to reinstate employees who were engaged in a work stoppage protected by LMRA Section 502. Pet. App. 5a, 35a.[1] Some 13 years of protracted litigation then ensued, involving a number of administrative and judicial decisions that are no longer in issue. Those proceedings culminated in an opinion of the D.C. Circuit remanding the Board's first

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[1] Section 8(a)(3) of the NLRA makes it an unfair labor practice for an employer to "discriminat[e] in regard to hire or tenure of employment * * * to encourage or discourage membership in any labor organization."

supplemental decision. See *Oil, Chem. & Atomic Workers Int'l Union* v. *NLRB*, 46 F.3d 82 (D.C. Cir.), remanding *TNS, Inc.*, 309 N.L.R.B. 1348 (1992), cert. denied, 516 U.S. 821 (1995).[2]

On September 30, 1999, the Board issued a second supplemental decision in response to the D.C. Circuit's 1995 remand. In that decision, the Board (with one member dissenting) sustained the 1982 complaint. Pet. App. 35a-83a. Applying a four-part test (see p. 2, *supra*), the Board concluded that the employees represented by petitioner were "engaged in a work stoppage protected by Section 502" when they ceased work on May 1, 1981. Pet. App. 57a. Of particular relevance here, the Board found that the General Counsel had carried his burden of proof with respect to the third requirement for a protected Section 502 work stoppage, *i.e.*, that "ascertainable, objective evidence" supported the employees' good-faith belief that their working conditions at the TNS plant were abnormally dangerous. *Id.* at 56a-57a.

In so concluding, the Board cited the following "factors" that an administrative law judge had identified in earlier proceedings: levels of DU dust in the air in excess of the "maximum permissible concentration" established by TDRH; the protracted use of respirators by a substantial number of employees; excessive "average whole body uranium exposures"; and excessive "uranium-in-urine" levels. Pet. App. 57a. "[T]his evidence," the Board found, "constitutes objective proof supporting [the employees'] belief that their workplace

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[2] See *TNS, Inc.*, 288 N.L.R.B. 20 (1988) (on remand from *Oil, Chem. & Atomic Workers Int'l Union* v. *NLRB*, 806 F.2d 269 (D.C. Cir. 1986)); Pet. App. 5a-6a, 35a-38a.

had become too unsafe an environment to continue working." *Ibid.*

Next, the Board held that, under NLRA Section 8(a)(3), an employer may not permanently replace employees who engage in a work stoppage that is protected by Section 502. Pet. App. 58a-64a. The Board thus concluded that TNS committed an unfair labor practice by refusing to reinstate the employees in the bargaining unit after they unconditionally offered to return to work on February 15, 1982. *Id.* at 64a. As a remedy, the Board ordered TNS to reinstate and make whole the employees who participated in the work stoppage. *Id.* at 64a-65a.

4. TNS filed a petition for review of the Board's order in the United States Court of Appeals for the Sixth Circuit. Pet. App. 1a. The court afforded deference to the Board's four-part test for determining whether a work stoppage is protected by LMRA Section 502. The court also deferred to the Board's conclusion that, under NLRA Section 8(a)(3), an employer may not permanently replace employees who are engaged in such a work stoppage. *Id.* at 10a-17a.

However, the court held that "the Board's conclusion —that objective evidence supported the employees' belief that their workplace had become too dangerous to work in—is simply not supported by substantial evidence on the record considered as a whole." Pet. App. 32a. After reviewing the record, the court concluded that "the pieces of evidence relied upon by the Board as providing objective evidence to support the TNS employees' belief that their workplace was abnormally dangerous merely show that TNS had largely

complied with regulatory limits set with a considerable margin for safety." *Id.* at 31a; see *id.* at 26a-32a.[3]

Having rejected the Board's "objective evidence" finding on substantial evidence grounds, the court of appeals went on to consider whether a remand to the Board would be appropriate in this case. See Pet. App. 32a-34a. Noting its agreement with TNS's "inexcusable delay argument" (*id.* at 3a), the court concluded: "we VACATE the Board's decision finding TNS to have breached its obligations under [Section] 502, rather than remanding it for further consideration." *Id.* at 34a.

In declining to remand this case to the Board for further consideration, the court of appeals noted that some 17 years had elapsed between the filing of the administrative complaint against TNS in 1982 and the Board's issuance of its second supplemental decision in 1999. Pet. App. 34a. The court indicated that it could not "see a reasonable way to hold [TNS] responsible for damages accruing over all of this time, especially when its structure and business changed in the interim." *Ibid.*

ARGUMENT

The court of appeals' assessment of the evidentiary record in this case does not raise an issue warranting further review by this Court. The court of appeals' declining to remand this case to the Board for further consideration does not independently raise an issue of general importance or otherwise merit further review.

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[3] Petitioner incorrectly states (Pet. 11) that the court of appeals acted *sua sponte* in addressing whether the record in this case adequately supports the Board's "objective evidence" determination. Rather, the parties extensively addressed that issue in the court of appeals. See TNS C.A. Br. 55-63; NLRB C.A. Br. 50-56; Pet'rs C.A. Br. 9-33.

The petition for a writ of certiorari should therefore be denied.

1. a. The validity of the Board's determination that TNS committed an unfair labor practice in this case turns on whether, as the Board concluded, "objective evidence" supported the employees' good-faith belief that conditions at TNS's plant had become abnormally dangerous when they began a work stoppage on May 1, 1981. See Pet. App. 26a-32a, 56a-57a, 64a. The court of appeals, however, held that substantial evidence on the record considered as a whole does not support the Board's "objective evidence" finding. *Id.* at 32a.

The Board believes that there is substantial evidence in the record to support its "objective evidence" finding, and thus that the court of appeals should have sustained that finding. See 29 U.S.C. 160(e). However, the Board recognizes that "[w]hether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). This Court will intervene "only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Ibid.* In the Board's judgment, the court of appeals' substantial evidence review of the conflicting evidence contained in the lengthy and complex record in this case does not present any issue meeting this Court's standards for certiorari.

b. The court of appeals' decision declining to remand this 1982 labor dispute to the Board for further consideration of the factual issues addressed in the Board's 1999 second supplemental decision, which is the focus of the petition for certiorari, also does not raise an issue of general importance warranting this Court's review. In

declining to remand, the court of appeals articulated a fact-bound rationale. See Pet. App. 34a (citing changes in TNS's "structure and business" during the interim). In addition, the court's holding on the substantial evidence issue is the functional equivalent of a conclusion that, on this record, "it would [not] have been possible for a reasonable jury to reach the Board's conclusion." *Allentown Mack Sales & Service, Inc.* v. *NLRB*, 522 U.S. 359, 366-367 (1998). Under that holding, no practical purpose would have been served by a remand to the Board for further consideration. See *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 767 n.6 (1969) (disapproving "meaningless" remands).[4]

2. Petitioner contends that this Court's review is necessary in this case in order to decide whether a court of appeals has authority to vacate a Board order "solely on the ground that the Board engaged in inexcusable delay in reaching its decision." Pet. i; see Pet. 14. However, the issue framed by petitioner is not presented by this case. The court of appeals did *not* vacate the Board's order solely on the ground of inexcusable agency delay. Rather, the court set aside the Board's order as unsupported by substantial evidence on the record considered as a whole. See Pet. App. 26a-32a. Although the court did address the issue of administrative delay, it did so in respect to the question of remand, not the question of enforcement. *Id.* at 32a-34a. If, as the court held, the Board's order is not supported by substantial evidence on the record considered as a whole, then that order is not entitled to enforcement. See, *e.g.*, *Allentown Mack Sales & Service*, 522 U.S. at 380.

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[4] For these reasons, the Board did not file its own petition for a writ of certiorari in this case.

Contrary to petitioner's suggestion (Pet. 14), the court of appeals' decision does not conflict with this Court's decision in *NLRB* v. *J.H. Rutter-Rex Manufacturing Co.*, 396 U.S. 258 (1969). In *Rutter-Rex*, the court of appeals reduced the amount of a Board back pay award solely on the ground of inordinate administrative delay during the back pay proceeding. See *id.* at 260-262. This Court held that the court of appeals "exceeded the narrow scope of review provided for the Board's remedial orders when it shifted the cost of the delay from the company to the employees." *Id.* at 266. *Rutter-Rex* is inapposite. Here, the court of appeals denied enforcement of the Board's order on substantial evidence grounds, not because of administrative delay.

Finally, petitioner contends (Pet. 14, 18) that, although the court of appeals' decision is consistent with decisions of the Second Circuit in *Emhart Indus.* v. *NLRB*, 907 F.2d 372 (1990), and *Olivetti Office U.S.A., Inc.* v. *NLRB*, 926 F.2d 181, cert. denied, 502 U.S. 856 (1991), the decision below deepens a pre-existing conflict between those decisions and that of the D.C. Circuit in *Southwest Merchandising Corp.* v. *NLRB*, 943 F.2d 1354 (1991). However, there is no pre-existing conflict of decisions. In the Second Circuit cases relied on by petitioner, the court concluded that particular changed circumstances which had occurred during the period of administrative delay—not merely the delay standing alone—warranted denying enforcement of the Board's order. See *Emhart Indus.*, 907 F.2d at 379-380 (parties had repeatedly agreed to reinstate strikers according to a procedure found unlawful in subsequent Board order); *Olivetti Office U.S.A.*, 926 F.2d at 189-190 (parties had agreed to compensate employees for the same losses covered by subsequent Board order). In other words, changed circumstances that occurred

during the Board's delay and which the Board failed to account for in its order rendered the Board's remedy in those cases incapable of "effectuat[ing] any reasonable policy of the [NLRA]." *Emhart Indus.*, 907 F.2d at 379; *Olivetti Office U.S.A.*, 926 F.2d at 190 (concluding that Board's remedy went "beyond any legitimate remedial purpose"). In *Southwest Merchandising*, by contrast, no such issue of changed circumstances was before the court; rather, the D.C. Circuit simply rejected, as inconsistent with *Rutter-Rex*, the employer's claim that laches alone is a sufficient ground for denying enforcement of a Board order, see 943 F.2d at 1357-1358—a proposition not challenged by the Second Circuit in the cases cited by petitioner, see, *e.g.*, *Emhart Indus.*, 907 F.2d at 379 (noting that "courts have been reluctant to deny enforcement on the basis of administrative delay alone").

Moreover, the decision of the court below does not conflict with *Southwest Merchandising*. The court of appeals here set aside the Board's order on substantial evidence grounds, not because of administrative delay. See Pet. App. 32a ("Since courts are to be deferential in reviewing agency determinations, denying enforcement of an order solely on the basis of delay is inappropriate."). Nothing in *Southwest Merchandising* precludes a reviewing court from setting aside a Board order on such grounds. Nor is there any inconsistency between *Southwest Merchandising* and the court of appeals' conclusion that further proceedings on remand would be unwarranted in light of the lengthy and elaborate administrative proceedings that had already occurred in this case and the significant changes to TNS's "structure and business" that occurred during the 17 years that had elapsed between the filing of the administrative complaint against TNS in 1982 and the Board's

issuance of its second supplemental decision in 1999. See *id.* at 34a. The court of appeals, having determined that the Board's enforcement order was not supported by substantial evidence on the record considered as a whole, was not precluded by anything in *Southwest Merchandising* from concluding that, in the context of this case, further proceedings were not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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